Supreme Court, U.S.
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In The

Supreme Court of the United States

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC HOLDER, U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the First Circuit Court of Appeals err in holding, post-*Kucana*, that it did not have jurisdiction to review a denial of a Motion to Reopen *sua sponte* although the Petitioner raised constitutional and legal issues that the majority of circuits have treated as reviewable?

2. Did the First Circuit Court of Appeals err in holding, post-*Kucana*, that it did not have jurisdiction to review a *sua sponte* Motion to Reopen although such determinations are governed, in relevant part, by the same statutory and regulatory framework as other reopening determinations?

PARTIES TO PROCEEDING

Kelmer Da Silva Neves, Petitioner

Eric Holder, U.S. Attorney General, Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINION AND JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
STATUTORY AND REGULATORY BACKGROUND	5
REASONS FOR GRANTING THE WRIT	7
ARGUMENT OF THE FIRST ISSUE	9
1. Article 3 Courts have jurisdiction to review Constitutional and Legal questions	9
ARGUMENT OF THE SECOND ISSUE	12
2. Motions to reopen *sua sponte* are governed by the same statutory provisions of which *Kucana* has held are reviewable	12
ARGUMENT OF THE THIRD ISSUE	18
3. Petitioner has established a prima facie case for ineffective assistance of counsel which has resulted in a due process violation of his rights	18
CONCLUSION	25

TABLE OF CONTENTS – Continued

Page

APPENDIX

OPINION of the United States Court of Appeals for the First Circuit, Docket No. 07-1091, Entered July 21, 2010; Petition for Review Dismissed ..... App. 1

OPINION of the United States Court of Appeals for the First Circuit, Docket No. 07-1091, Entered December 2, 2010; Petition for Rehearing En Banc Denied with mandate issued January 7, 2011 ..... App. 14, 25

ORDER of the Supreme Court of the United Stated, Docket No. 09-650, Entered May 17, 2010; Writ of Certiorari granted, judgment vacated, case remanded to the First Circuit Court of Appeals ..... App. 16

OPINION of the United States Court of Appeals for the First Circuit, Docket No. 07-1091, Entered June 4, 2009; Petition for Review Dismissed for Lack of Jurisdiction ..... App. 18

ORDER of the Executive Office for Immigration Review, Board of Immigration Appeals, Agency No. A77 549 308, Entered December 14, 2006; Affirming the decision of the Immigration Judge ..... App. 22

Constitutional and Statutory Provisions Involved ..... App. 27

TABLE OF AUTHORITIES

Page

CASES

Ali v. Gonzales, 448 F.3d 515 (2d Cir. 2006) 16

Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999) 16

Argueta v. Holder, 617 F.3d 109 (2d Cir. 2010) 9

Belay-Gebru v. INS, 327 F.3d 998 (10th Cir. 2003) 10, 16

Beltre-Veloz v. Mukasey, 55 F.3d 7 (1st Cir. 2008) 24

Bernal-Vallejo v. INS, 195 F.3d 56 (1st Cir. 1999) 10, 11, 19

Boakia v. Gonzalez, 447 F.3d 1 (1st Cir. 2006) 20, 22, 24

Bridges v. Wixon, 326 U.S. 135 (1945) 21

Caldero-Guzman v. Holder, 577 F.3d 345 (1st Cir. 2009) 12, 16

Calle-Vujiles v. Ashcroft, 320 F.3d 472 (3d Cir. 2003) 16

Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102 (9th Cir. 2006) 10

Cevilla v. Gonzales, 446 F.3d 658 (7th Cir. 2006) 10

Chen v. Gonzales, 415 F.3d 151 (1st Cir. 2005) 8, 17

Cruz v. Att'y Gen. of U.S., 452 F.3d 240 (3d Cir. 2006) 10

Dada v. Mukasey, 554 U.S. 1 (2008) 5, 7, 21

Denko v. INS, 351 F.3d 717 (6th Cir. 2003) 18

TABLE OF AUTHORITIES – Continued

Page

Doh v. Gonzales, 193 F. App'x 245 (4th Cir. 2006) 16

Do Nascimento v. Mukasey, 549 F.3d 12 (1st Cir. 2008) 21, 24

Ekimian v. INS, 303 F.3d 1153 (9th Cir. 2002) 16

Enriquez-Alvarado v. Ashcroft, 371 F.3d 246 (5th Cir. 2004) 16

Fadiga v. Attorney General of the United States, 488 F.3d 142 (3d Cir. 2007) 18

Gor v. Holder, 607 F.3d 180 (6th Cir. 2010) 7, 13

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) 15

Harchenko v. INS, 379 F.3d 405 (6th Cir. 2004) 16

Heckler v. Chaney, 470 U.S. 821 (1985) 15

Hernandez v. Reno, 238 F.3d 50 (1st Cir. 2001) 20

In re Beckford, 22 I. & N. Dec. 1216 (BIA 2000) 6

In re Grijalva, 21 I. & N. Dec. 472 (BIA 1996) 23

In re J-J-, 21 I. & N. Dec. 976 (BIA 1997) 6, 22, 24

In re Lozada, 19 I. & N. Dec. 637 (BIA 1988) 4, 18, 19

INS v. Chadha, 462 U.S. 919 (1983) 15

Iturribarria v. INS, 321 F.3d 889 (9th Cir. 2003) 22

Jaimes-Aguirre v. U.S. Att'y Gen., 369 F. App'x 101 (11th Cir. 2010) 13

TABLE OF AUTHORITIES – Continued

Page

Jobe v. INS, 212 F.3d 674, *rev'd en banc*, 238 F.3d 96 (1st Cir. 2001) 22

Jordan v. DeGeorge, 341 U.S. 223 (1951) 21

Juan Monjarez-Munoz v. INS, 327 F.3d 892 (9th Cir. 2003) 23

Keene Corp. v. United States, 508 U.S. 200 (1993) 15

Kichichian v. Mukasey, 535 F.3d 15 (1st Cir. 2008) 24

Kontrick v. Ryan, 540 U.S. 443 (2004) 15

Kucana v. Holder, 130 S. Ct. 827 (2010) ..... *passim*

Kucana v. Mukasey, 533 F.3d 534 (7th Cir. 2008) 7

Kulkawik v. Holder, 571 F.3d 296 (2d Cir. 2009) 23

Lenis v. U.S. Attorney Gen., 525 F.3d 1291 (11th Cir. 2008) 8, 10, 16

Luis v. INS, 196 F.3d 36 (1st Cir. 1999) 10, 12, 16

Maravilla v. Ashcroft, 381 F.3d 855 (9th Cir. 2004) 19

Mendiola v. Holder, 585 F.3d 1303 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010) 11

Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005) 18

Mosere v. Mukasey, 552 F.3d 397 (4th Cir. 2009) 11

Munoz de Real v. Holder, 595 F.3d 747 (7th Cir. 2010) 13

TABLE OF AUTHORITIES – Continued

Page

Nawaz v. Holder, 314 F. App'x 736 (5th Cir. 2009) 8, 10

Ochoa v. Holder, 604 F.3d 546 (8th Cir. 2010) 7, 13

Pilch v. Ashcroft, 353 F.3d 585 (7th Cir. 2003) 16

Raza v. Gonzales, 484 F.3d 125 (1st Cir. 2007) 8, 17

Ricardo Davila-Bardales v. INS, 27 F.3d 1 (1st Cir. 1994) 20

Rosario v. Holder, 627 F.3d 58 (2d Cir. 2010) 9

Ruiz v. Holder, 374 F. App'x 170 (2d Cir. 2010) 13

Scorteanu v. INS, 339 F.3d 407 (6th Cir. 2003) 22

Surganova v. Holder, 612 F.3d 901 (7th Cir. 2010) 18

Tamenut v. Mukasey, 521 F.3d 1000 (8th Cir. 2008) 10, 16

Tandayu v. Mukasey, 521 F.3d 97 (1st Cir. 2008) 8, 17

Toban v. Ashcroft, 385 F.3d 40 (1st Cir. 2004) 8, 17

STATUTES AND OTHER AUTHORITIES

5 U.S.C. § 701 1

8 U.S.C. § 3.1(a)(7) 2

8 U.S.C. § 1103(g)(2) 16, 17

8 U.S.C. § 1229a(c)(7) 7

8 U.S.C. § 1229a(e)(1) 23

8 U.S.C. § 1252 ..... 1, 12

TABLE OF AUTHORITIES – Continued

Page

8 U.S.C. § 1252(a)(2)(B)(ii) 2, 14, 15

8 U.S.C. § 1252(a)(2)(D) 20

Fifth Amendment to the United States Constitution 1, 19

8 C.F.R. § 3.2 (1959) 5

8 C.F.R. § 1003.2 ..... 5, 8, 14

8 C.F.R. § 1003.2(a) 5, 6, 12, 14

8 C.F.R. § 1003.2(c) 5, 6

8 C.F.R. § 1003.2(c)(1) 6

8 C.F.R. § 1003.2(4) 15

8 C.F.R. § 1103(a) 6

8 C.F.R. § 1240.10 1

23 Fed. Reg. 9115, 9118-19 (1958) 5, 6

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ..... 7, 14

Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(1), 104 Stat. 4978, 5066 5

OPINION AND JUDGMENT BELOW

The Court of Appeals' order is officially reported at 613 F.3d 30 and reprinted in the Appendix to the Petition at App. 1.

STATEMENT OF JURISDICTION

By judgment entered July 21, 2010, the United States Court of Appeals for the First Circuit dismissed Petitioner's petition for review. By judgment entered December 2, 2010, with Mandate issued on January 7, 2011, the United States Court of Appeals for the First Circuit denied Petitioner's petition for rehearing en banc.

Petitioner thereafter timely filed this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution, 5 U.S.C. § 701, 8 U.S.C. § 1252, 8 C.F.R. § 1240.10. The relevant statutory and constitutional provisions are set out in the appendix.

STATEMENT OF THE CASE

Petitioner was an applicant for asylum withholding of removal, and protection based upon Article 3 of the Convention Against Torture. The Immigration Judge denied the Petitioner's application for relief. Thereafter, the Petitioner filed a timely appeal with the Board of Immigration Appeals (BIA). By order dated December 3, 2003, the BIA affirmed the Immigration Judge's order. On June 30, 2006, Petitioner filed a second motion to reopen based upon ineffective assistance of counsel. On December 14, 2006, the BIA denied this Motion. Petitioner thereafter timely filed a Petition for Review with the United States Court of Appeals for the First Circuit. This petition for review was based on a final agency determination. 8 U.S.C. § 3.1(a)(7). The First Circuit had jurisdiction based upon 8 U.S.C. § 1252(a)(2)(B)(ii).

By judgment entered June 4, 2009, the First Circuit dismissed Petitioner's petition for review for lack of jurisdiction. By judgment entered September 3, 2009, with Mandate issued on September 17, 2009, the First Circuit denied Petitioner's petition for rehearing en banc.

The Petitioner timely appealed to the United States Supreme Court. By judgment entered on May 17, 2010, the Supreme Court granted the Writ and remanded the case to the First Circuit. By judgment entered July 21, 2010, the First Circuit dismissed Petitioner's petition for review. By judgment entered December 2, 2010, with Mandate issued on January

7, 2011, the First Circuit denied Petitioner's petition for rehearing en banc.

STATEMENT OF FACTS

Petitioner is a native and citizen of Brazil and entered the United States as a B-2 visitor in 1999. Petitioner retained Joarez Reis, who he believed to be an attorney, to represent him in his applications for asylum, withholding of removal, and protection under the Convention against Torture. On November 1, 2000, the Immigration Judge denied these applications for relief. Thereafter, on November 21, 2000, Mr. Reis filed a Notice of Appeal to the BIA on behalf of the Petitioner. However, since Mr. Reis was not a licensed attorney, he put a post office box [rented by Mr. Reis] as the forwarding address and signed the Petitioner's name. *See* Administrative Record ("AR") 20.

On September 25, 2001, the Board dismissed the appeal, deeming it abandoned because there was not an address to which the mail could be effectively sent.

While Petitioner's appeal was pending, Mr. Reis fled Massachusetts to avoid criminal prosecution. By the time of the Board's decision, Mr. Reis had been arrested by the FBI and was later convicted and imprisoned for 54 counts of mail fraud and lying to the government. AR 22-29.

In the meantime, in December 2000, the Petitioner retained another attorney, John Dvorak, to file a Labor Certificate under section 245(i). The Petitioner informed Attorney Dvorak of his appeal pending with the BIA. However, he did not file a Notice of Appearance until April 2002. AR 31. The Board forwarded a copy of the September 25, 2001 decision. Attorney Dvorak stated that he would file a Motion to Reopen the proceedings. In May 2003, Petitioner went to Attorney Dvorak's office to inquire about the Motion and discovered that nothing had been filed. Thereafter, Petitioner discharged Attorney Dvorak. AR 33.

Then, Petitioner retained Gary Yerman. In August 2003, Attorney Yerman filed a Motion to Reopen the Petitioner's proceedings. Mr. Yerman's motion was based on the requirements of *In re Lozada*, 19 I. & N. 637 (BIA 1988); however, he failed to attach the appropriate documentation in support of the case. Furthermore, Attorney Yerman failed to request the appropriate relief since the Petitioner was eligible for Adjustment of Status under the Section 245(i) and the LIFE Act. AR 35. Petitioner frequently contacted Mr. Yerman's office to inquire about the status of the Motion. In June 2006, the Petitioner discovered that the Motion had been denied on December 3, 2003. Petitioner discharged Attorney Yerman and retained Joseph Rose to file a subsequent Motion to Reopen.

STATUTORY AND REGULATORY BACKGROUND

Reopening determinations are governed by a series of statutes and regulations. The reopening procedure dates at least as far back as 1916. The BIA first regularized Motions to Reopen in 1958. *Dada v. Mukasey*, 554 U.S. 1, 13 (2008) (*citing* 23 Fed. Reg. 9115, 9118-19 (1958)). The 1958 regulation provided that "[t]he Board may on its own motion reopen or reconsider any case in which it has rendered a decision." 8 C.F.R. § 3.2 (1959).

The formal distinction between a "motion to reopen" and a "motion to reopen sua sponte" dates to 1990, when "Congress ordered the Attorney General to 'issue regulations with respect to . . . the period of time in which motions to reopen . . . may be offered in deportation proceedings,' including 'a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions.'" *Dada*, 554 U.S. at 13 (*quoting* Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(1), 104 Stat. 4978, 5066) (ellipses in original). The resulting regulation, which is set out in its current form at 8 C.F.R. § 1003.2, not only provides that the Board "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision," but also sets forth procedures for a party to file his or her own motion. 8 C.F.R. §§ 1003.2(a) and (c).

The Board's power to reopen *sua sponte* or on "its own motion" may be invoked (and typically is invoked)

by a motion from a party. With respect to an ordinary motion to reopen, of the type addressed by this Court in *Kucana v. Holder*, 130 S. Ct. 827 (2010), a party has the right to file a single motion within 90 days of the decision to be reopened, and the regulation sets forth various substantive prerequisites that such a motion must satisfy in order to be considered. 8 C.F.R. § 1003.2(c)(1). Satisfaction of these criteria, however, is not necessarily sufficient to obtain reopening under § 1003.2(c), which provides that "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board," and gives the Board "discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." 8 C.F.R. § 1003.2(a).

The substantive standards that apply to so-called *sua sponte* reopening are set out in the BIA's own binding precedent. The BIA employs an "exceptional circumstances" or "exceptional situation" standard in determining whether to grant such a motion. E.g., *In re Beckford*, 22 I. & N. Dec. 1216 (BIA 2000); *In re J-J-*, 21 I. & N. Dec. 976 (BIA 1997). The same regulation quoted above gives the Board discretion to grant relief in the *sua sponte* context as well. 8 C.F.R. § 1003.2(c). Until 1996, there was no explicit statutory authorization for reopening procedures of any sort. Instead, the Attorney General had identified the general grant of rulemaking authority for immigration matters, currently set out at 8 U.S.C. § 1103(a), as the basis for the regulations. *See, e.g.*, 23 Fed. Reg. at 9117; *Kucana*, 130 S. Ct. at 840 (Alito, J., concurring in the judgment). In 1996, Congress

for the first time dictated procedures for motions to reopen. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, 3009-593. The statute, now codified at 8 U.S.C. § 1229a(c)(7), "guarantees to each alien the right to file 'one motion to reopen proceedings,'" *Dada*, 554 U.S. at 15, and "simply lays out the requirements an alien must fulfill when filing a motion to reopen," *Kucana*, 130 S. Ct. at 833 n.6 (*quoting Kucana v. Mukasey*, 533 F.3d 534, 541 (7th Cir. 2008) (Cudahy, J., dissenting)). Those procedural requirements, however, do not touch on the Attorney General's authority to decide motions to reopen. Rather, as the Court explained in *Kucana*, the statute "is not directed to the agency's discretion to grant or deny motions to reopen." *Id.*

REASONS FOR GRANTING THE WRIT

Writ of Certiorari should be granted in this case in order for this Honorable Court to address the issues of significant legal importance regarding whether an Article III court has jurisdiction to review a constitutional claim embedded in a motion to reopen *sua sponte*. *Kucana v. Holder*, 130 S. Ct. 827, 840 (2010). There is a division among the lower courts concerning judicial review in immigration cases involving motions to reopen "sua sponte." Two similar cases have also petitioned this Court to review this issue: *Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010) and *Ochoa v. Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010).

In *Kucana*, the Supreme Court rejected the idea that an agency can curtail the jurisdiction of an Article III court and held that "[a]ction on motions to reopen, made discretionary by the Attorney General only, remain subject to judicial review." *Kucana*, 130 S. Ct. at 840.

The regulation, 8 C.F.R. § 1003.2, which is at issue in *Kucana*, is the same one that this Court of Appeals has held defines the BIA's discretion over *sua sponte* reopening so broadly as to preclude review. Several sister courts have suggested that they retain jurisdiction to review constitutional challenges to BIA refusals to reopen proceedings *sua sponte*. *Nawaz v. Holder*, 314 F. App'x 736, 736 (5th Cir. 2009); *Lenis v. U.S. Attorney Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008). In this case, the Petitioner has established that the BIA committed an "error of law or exercised its judgment in an arbitrary, capricious, or irrational way." *Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008) (*quoting Raza v. Gonzales*, 484 F.3d 125, 127 (1st Cir. 2007)); *see also Chen v. Gonzales*, 415 F.3d 151, 153 (1st Cir. 2005) ("An abuse of discretion exists where the BIA misinterprets the law, or acts either arbitrarily or capriciously.") (*quoting Toban v. Ashcroft*, 385 F.3d 40, 45 (1st Cir. 2004)). The Petitioner has established that the arbitrary and standardless denial of his Motion to Reopen has resulted in a due process violation of his Constitutional rights. This Court's intervention is necessary to resolve the circuit

conflict and provide needed guidance to the lower courts.

ARGUMENT OF THE FIRST ISSUE

1. Article 3 Courts have jurisdiction to review Constitutional and Legal questions.

This case presents an issue of significant legal importance regarding whether an Article III court has jurisdiction to review a constitutional claim embedded in a motion to reopen *sua sponte*. Currently, the Circuit courts are split concerning jurisdiction to review denials of Motions to Reopen *sua sponte* based upon constitutional issues or questions of law.

Almost every Court of Appeals, has clearly held that review is available for constitutional and statutory questions. For example, the Second Circuit has held that it has jurisdiction to consider legal claims. *See Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (holding that it can "review 'all constitutional claims or questions of law' raised by the BIA's exercise of its discretion" (*quoting Argueta v. Holder*, 617 F.3d 109, 112 (2d Cir. 2010))).

In explaining the boundaries of its review, the Second Circuit stated: "We ask whether the BIA is expressing legal doctrine or whether it is engaged in the factfinding and factor-balancing that are at the core of its discretion." *Rosario*, 627 F.3d at 62. Eight other Courts of Appeals (the First, Third, Fifth,

Seventh, Eighth, Ninth, Tenth, and Eleventh) have previously adopted this position or a close variant of it. *See, e.g., Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999) ("This court has jurisdiction to review Luis's due process claim." (*citing Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999))); *Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240 (3d Cir. 2006) (holding that there would be jurisdiction to review denial where underlying conviction had been vacated); *Nawaz v. Holder*, 314 F. App'x 736, 737 (5th Cir. 2009) ("'While we do not have jurisdiction to consider Nawaz's nonconstitutional challenges to the BIA's refusal to reopen his removal proceedings sua sponte, we retain jurisdiction to consider constitutional challenges that were raised before the BIA."); *Cevilla v. Gonzales*, 446 F.3d 658, 660-61 (7th Cir. 2006) (Posner, J.) (implying that grounds involving "the application of a legal standard" are reviewable); *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc) ("Although this court lacks jurisdiction over Tamenut's challenge to the BIA's decision not to reopen sua sponte, we generally do have jurisdiction over any colorable constitutional claim."); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1106 (9th Cir. 2006) (jurisdiction to review where a "'key part' of the government's case [for] removal," such as the validity of a predicate criminal conviction, is challenged); *Belay-Gebru v. INS*, 327 F.3d 998 (10th Cir. 2003) (finding decisions discretionary but *citing Luis*, 196 F.3d at 40); *Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 n.7 (11th Cir. 2008) ("[A]n appellate court may have jurisdiction over

constitutional claims related to the BIA's decision not to exercise its sua sponte power.").

These Courts of Appeals have recognized that claims of the sort presented in this case, such as ineffective assistance of counsel, are the types of constitutional and legal questions for which there is jurisdiction. For example, courts have found jurisdiction to hear appeals where the petitioner's claim concerns a denial of due process stemming from ineffective counsel. *See Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999) (holding that there was jurisdiction to hear "Bernal's claim of ineffective assistance of counsel amounting to a due process violation [because that] argument does not involve a matter that Congress committed to agency discretion."); *Mendiola v. Holder*, 585 F.3d 1303, 1309-10 (10th Cir. 2009) (jurisdiction "where the motion alleges ineffective assistance of counsel rising to the level of a due process violation"), *cert. denied*, 131 S. Ct. 502 (2010).

By contrast, the First, Sixth and Fourth Circuits' refusal to exercise jurisdiction over constitutional and legal claims is out of step with the practice of most other Courts of Appeals. Both the Sixth and Fourth Circuits took the position that review was unavailable for denials of *sua sponte* reopening even in cases that involved constitutional or statutory questions. *Mosere v. Mukasey*, 552 F.3d 397, 400 (4th Cir. 2009) (stating categorically that there is no jurisdiction to review *sua sponte* denials of reopening).

As such, the decision in this case is contradictory to the majority of the other Courts of Appeals.

ARGUMENT OF THE SECOND ISSUE

2. Motions to reopen *sua sponte* are governed by the same statutory provisions of which *Kucana* has held are reviewable.

In this case, the First Circuit has held that "*Kucana* does not affect the subsidiary holding in our earlier opinion that federal courts lack jurisdiction to review the BIA's decision to exercise *sua sponte* authority to reopen proceedings." The First Circuit states that such decisions are "committed to the BIA's unfettered discretion" by law. 8 C.F.R. § 1003.2(a); *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Caldero-Guzman v. Holder*, 577 F.3d 345, 348 (1st Cir. 2009).

Kucana held that § 1252, the same grant of jurisdiction that is at issue here, could not be construed to permit the "extraordinary delegation" that would "free the Executive to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" 130 S. Ct. at 830. Accordingly, *Kucana* held that reopening determinations under 8 C.F.R. § 1003.2(a) were to be reviewed for abuse of discretion. Given that the BIA's decision to reopen *sua sponte* is made discretionary only by regulation, and not by any statute, the Seventh Circuit has applied abuse of discretion review to such decisions,

just as it does to review of non-*sua sponte* decisions to reopen after *Kucana*. *Munoz de Real v. Holder*, 595 F.3d 747, 750 (7th Cir. 2010).

The First Circuit has held in this case that *Kucana* has not changed the terms of reviewability of *sua sponte* reopening determinations. Other circuits have also applied this interpretation. *Ruiz v. Holder*, 374 F. App'x 170, 173 (2d Cir. 2010); *Ochoa v. Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010); *Jaimes-Aguirre v. U.S. Att'y Gen.*, 369 F. App'x 101, 103 (11th Cir. 2010).

However, these circuits have come to this conclusion, relying on precedent decisions that are no longer applicable. In the Sixth Circuit, the lead opinion stated that the panel was bound by two prior Sixth Circuit cases holding that reopening decisions were unreviewable, but explained that "the Supreme Court's reasoning set out in *Kucana* undermines the continuing validity of [those cases], since both cases are based on the same premise rejected in *Kucana*": that an agency can "insulate its own decisions from judicial review" by regulation. *Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010).

The First Circuit plainly refused to apply *Kucana*'s central holding without explanation. In deeming such decisions unreviewable, that result directly contradicts *Kucana*'s central holding. *Kucana v. Holder*, 130 S. Ct. 827, 840 (2010). In *Kucana*, the Supreme Court rejected the idea that an agency can curtail the jurisdiction of an Article III court and held that

"[a]ction on motions to reopen, made discretionary by the Attorney General only, remain subject to judicial review." *Id.* at 840.

The regulation, 8 C.F.R. § 1003.2, which is at issue in *Kucana*, is the same regulation that this Court of Appeals has determined defines the BIA's discretion over *sua sponte* reopening so broadly as to preclude review. In *Kucana*, the Court interpreted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546 to assess whether it stripped the Circuit courts of jurisdiction to review motions to reopen. The Court noted that Congress had not codified the provision in the regulation making such decisions discretionary. The Court read the phrase "specified under this subchapter" in section 1252(a)(2)(B)(ii) to mean that "Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana*, 130 S. Ct. at 836-37.

The Court concluded that Congress intended judicial review of motions to reopen to be as broad as it was before the IIRIRA was enacted: "The BIA has broad discretion, conferred by the Attorney General, 'to grant or deny a motion to reopen,' 8 C.F.R. § 1003.2(a), but courts retain jurisdiction to review, with due respect, the Board's decision." *Kucana*, 130 S. Ct. at 838. The Court found the idea of an agency regulation placing a matter beyond court jurisdiction to contravene the "presumption 'that executive determinations are generally subject to judicial review,'" *id.* at 839

(*quoting Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)), "the longstanding exercise of judicial review of administrative rulings on reopening motions," *id.* at 831, and the "congressional design" that "[Congress], and only [Congress], would limit the federal courts' jurisdiction," *id.* at 839-40. Otherwise, the agency "would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" *Ibid.*

Therefore, the argument that review of the denial of the Petitioner's motion to reopen is barred by the confluence of 8 U.S.C. § 1252(a)(2)(B)(ii) and 8 C.F.R. § 1003.2(4) fails. An agency cannot strip a court of jurisdiction to review its own actions by enacting regulations that deem these actions discretionary. Such authority would fundamentally alter the constitutional checks and balances put in place by the separation of powers doctrine. *See Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (holding that under the separation of powers doctrine, only Congress can expand or contract the subject-matter jurisdiction of a lower Article III court); *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts."); *INS v. Chadha*, 462 U.S. 919, 957-58 (1983) (holding that Congress may alter federal court jurisdiction through legislation, but to do so it must satisfy the requirements of bicameralism and presentment). *Kucana* reinforces the *Heckler v. Chaney*, 470 U.S. 821 (1985) decision that the

narrow exception to judicial review of agency decisions must originate from Congress, not the agency itself.

The majority of cases, including *Luis* and *Caldero-Guzman,* that find no jurisdiction to review denials of motions to reopen *sua sponte* do so on the basis of standardless regulations. *See, e.g., Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Caldero-Guzman v. Holder*, 577 F.3d 345, 348 (1st Cir. 2009); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (*per curiam*); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

The only two cases that cite a statute in concluding that such decisions are unreviewable point to 8 U.S.C. § 1103(g)(2), which generally authorizes "[t]he Attorney General [to] establish such regulations as the Attorney General determines to be necessary for carrying out this section." *See Tamenut v. Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (*en banc*) (*per curiam*) ("The regulation establishing the BIA's authority to reopen sua sponte was promulgated pursuant to a general grant of regulatory authority that sets no standards for this decision. See 8 U.S.C. § 1103(g)."); *Lenis v. U.S. Attorney Gen.*, 525 F.3d

1291, 1293 (11th Cir. 2008) ("[N]o statute expressly authorizes the BIA to reopen cases sua sponte; rather, the regulation at issue derives from a statute that grants general authority over immigration and nationalization matters to the Attorney General, and sets no standard for the Attorney General's decision-making in this context. See 8 U.S.C. § 1103(g)(2).")

In this case, the First Circuit determined that it does not have jurisdiction to review the Petitioner's *sua sponte* Motion to Reopen. In its decision, the fate of the Petitioner lies in the BIA's whimsical statement that the Board "declined to exercise our sua sponte authority." AR 2. The BIA does not give any rationale or explanation for its decision. However, this court concedes that the BIA cannot exercise its authority arbitrarily, irrationally, or in a manner that is contrary to the law or the Constitution. *Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008) (*quoting Raza v. Gonzales*, 484 F.3d 125, 127 (1st Cir. 2007)); *see also Chen v. Gonzales*, 415 F.3d 151, 153 (1st Cir. 2005) ("An abuse of discretion exists where the BIA misinterprets the law, or acts either arbitrarily or capriciously.") (*quoting Toban v. Ashcroft*, 385 F.3d 40, 45 (1st Cir. 2004)). As such, the BIA has arbitrarily and irrationally denied the Petitioner's motion resulting in a due process violation that is contrary to the Constitution.

ARGUMENT OF THE THIRD ISSUE

3. Petitioner has established a prima facie case for ineffective assistance of counsel which has resulted in a due process violation of his rights.

Petitioner has presented a prima facie case of ineffective assistance of counsel which has resulted in a due process violation of the Petitioner's rights. The First Circuit has erred in its statement that the Petitioner did not make any constitutional claims in his appeal. The crux of Mr. Neves' appeal is that the BIA's denial of the Petitioner's Motion to Reopen has resulted in a violation of his Constitutional right to due process. Several Courts of Appeals and the BIA have held that the ineffective assistance of counsel in removal proceedings can constitute a due process violation. *See, e.g., Denko v. INS*, 351 F.3d 717, 724 (6th Cir. 2003); *Fadiga v. Attorney General of the United States*, 488 F.3d 142, 153 (3d Cir. 2007) ("claims of ineffective assistance of counsel in immigration proceedings are grounded in the 'Fifth Amendment right to due process.'"); *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005); *Surganova v. Holder*, 612 F.3d 901, 907 (7th Cir. 2010) ("[W]e have recognized that the denial of effective assistance of counsel may under certain circumstances violate the due process guarantee of the Fifth Amendment."); *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988). Cf. *Mohammed*, 400 F.3d at 793 (recognizing that a due process violation occurs when "the proceeding was so fundamentally unfair that the alien was

prevented from reasonably presenting his case" (*quoting Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004))).

The Constitutional claim is embedded in the fact that Mr. Neves has established a prime facie case for ineffective assistance of counsel. Neves repeatedly argued this point in his initial brief:

> "Ineffective assistance of counsel is a denial of **due process under the Fifth Amendment** if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." Petitioner's Brief at 13.
>
> Consequently, these actions had serious implications on the Petitioner. First, he was **denied due process** rights to appeal his asylum claim and apply for subsequent relief. Secondly, he was **denied his due process** right to file a Motion to Reopen and Remand within the proscribed period. [The BIA's decision denied the case based on timeliness.] Petitioner's Brief at 17.
>
> Counsel's ineffectiveness gives rise to a **due process violation** since the proceeding was so fundamentally unfair that Petitioner was prevented from reasonably presenting his case. *See Lozada, supra*; *Bernal-Vallejo v. INS*, 195 F.3d 56 (1st Cir. 1999). Petitioner's Brief at 18.
>
> The Court may find a **due process violation** where counsel's actions prevent the

> Petitioner from applying for discretionary relief. *Id.*; *Hernandez v. Reno*, 238 F.3d 50 (1st Cir. 2001). Petitioner's Brief at 18.

As such, the Petitioner continually argued that his case presents a constitutional issue in that there was a due process violation of his right to present his case due to ineffective assistance of counsel. The First Circuit had previously determined "Because the ineffective assistance claim is not before us . . . we are presented with no "constitutional claim[ ]." *Boakia v. Gonzalez*, 447 F.3d 1, 4 (1st Cir. 2006); 8 U.S.C. § 1252(a)(2)(D). Here, the First Circuit contradicted its own precedent as it previously concluded that a constitutional claim is embedded in a case involving ineffective assistance of counsel.

In this case, the Petitioner did clearly present a prima facie case for ineffective assistance of counsel and his resulting constitutional claim of a violation of due process. Here, the First Circuit has contradicted its own precedent and other circuits in determining that there was not a constitutional claim in this case. If a decision "decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable." *Ricardo Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994).

This court does have jurisdiction under REAL ID to review constitutional questions and the Petitioner has raised a constitutional question here. 8 U.S.C. § 1252(a)(2)(D) (2005). This Court has jurisdiction to

review whether the Petitioner's counsel was so ineffective that Petitioner was unable to present his adjustment of status application based on his eligibility under section 245(i). *See Do Nascimento v. Mukasey*, 549 F.3d 12, 17 (1st Cir. 2008).

The Petitioner has been irreparably harmed by this due process violation in that he has a removal order and will be barred from reentry into the United States for 10 years. These issues were repeatedly elaborated in the Petitioner's initial brief, supplemental brief, as well as the Petitioner's brief in response to the Court order after the remand from the Supreme Court. This constitutional claim is embedded in the Petitioner's argument that the BIA abused its discretion in failing to consider these constitutional issues in their denial of the Motion to Reopen and Motion to Reopen *sua sponte*. "[D]eportation is a drastic measure and at times the equivalent of banishment or exile." *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) (internal quotation marks omitted). Removal "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Given the severity of removal, this Court has emphasized that motions to reopen are an "important safeguard" designed to "ensure a proper and lawful disposition" of an alien's case. *Dada*, 554 U.S. at 3. This circuit court does have jurisdiction to

review the constitutional question embedded in the Petitioner's Motion to Reopen *sua sponte*.

Furthermore, the "due diligence" standard used by the First Circuit should be reviewed by the Panel in that it is erroneous as it does not take into account the fact that ineffective assistance of counsel constitutes "exceptional circumstances . . . beyond the control of the alien." Due diligence requires an alien to prove that the delay in filing the motion to reopen was due to "an exceptional circumstance beyond his control." *Scorteanu v. INS*, 339 F.3d 407, 414 (6th Cir. 2003); *see also Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). The BIA has determined that reopening a case *sua sponte* may be used in exceptional circumstances and is not meant to circumvent the regulations. *In re J-J-*, 21 I. & N. Dec. 976 (BIA 1997).

In this case, Petitioner has demonstrated exceptional circumstances and that he did act with "due diligence" in accordance with the standard set forth in precedent case law. *Jobe v. INS*, 212 F.3d 674, *rev'd en banc*, 238 F.3d 96 (1st Cir. 2001), *Boakai v. Gonzales*, 447 F.3d 1, 3 (1st Cir. 2006).

The decision in this case is clearly erroneous as it does not account for the role of the incompetent attorney in its "due diligence" analysis. "An attorney in the deportation process is especially important. For the alien unfamiliar with the laws of our country, an attorney serves a special role in helping the alien through a complex and completely foreign process. It is therefore reasonable for an alien to trust and

rely upon an attorney's advice." *Juan Monjarez-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003). This trust could reach to such an extent that if an alien fails to perform because of an attorney, "we can say that this is an exceptional circumstance 'beyond the control of the alien.'" *Id.* Similarly, the BIA's decision in *In re Grijalva*, 21 I. & N. Dec. 472 (BIA 1996), also lends support to the proposition that an alien's failure to attend a hearing based on negligent advice from an attorney constitutes an exceptional circumstance. This standard is clearly used in absentia proceedings and results in the rescinding of the removal order. 8 U.S.C. § 1229a(e)(1). This case presents identical circumstances which should result in the same outcome.

The Petitioner has established a prima facie case for ineffective assistance of counsel which was affirmed by the BIA. The First Circuit and BIA erred in this case by stating that the Petitioner failed to provide specific evidence to corroborate his assertion of due diligence. In a recent case, it was recognized that sworn affidavits from counsel must be considered evidence by the BIA. *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009). The Board failed to give proper weight to the sworn affidavit from Petitioner's prior counsel which detailed the actions taken by the Petitioner and by his Law Office. It is clear that the Petitioner relied on his attorney's representations that the decision has not been made on his case. This reliance is reasonable for the period of time that the Petitioner argues should be "tolled" as the BIA does not have a time limitation for responding to such

motions. The BIA may take months to multiple years to make a determination on a case. The Petitioner acted reasonably and with diligence considering his utmost reliance on assurances made from his counsel.

Here, an issue of law is raised in that the Board's decision was arbitrary and capricious in its finding that this case does not warrant exceptional circumstances and the Petitioner did not act diligently. Where the Board has exercised its authority in an arbitrary, capricious, or irrational matter, this Court must remand to the Board. *Kichichian v. Mukasey*, 535 F.3d 15, 22 (1st Cir. 2008). It is clear that the BIA has not followed its own precedent in determining that this case does not warrant exceptional circumstances. *In re J-J-*, *supra*. The decision by the Board is a reversible error of law that must be reviewed. In its analysis of due diligence, this Court must focus on the length of time that an alien failed to inquire into their status due to ineffective assistance of counsel and the length of time that an alien failed to act after the alien had knowledge of the attorney's error. *See Beltre-Veloz v. Mukasey*, 55 F.3d 7, 11 (1st Cir. 2008) (lack of due diligence where alien did not inquire into status for eight years despite knowledge of proceedings); *Do Nascimento v. Mukasey*, 549 F.3d 12, 18 (1st Cir. 2008); *see Boakia v. Gonzalez*, 447 F.3d 1, 4 (1st Cir. 2006) (lack of due diligence where Petitioner failed to file new motion for six months after hiring new counsel). In this instance, the Board erred in its application of the facts to its own precedent. The Petitioner here has shown that he consistently inquired about his case with his counsel. Petitioner

has also shown that he hired new counsel immediately upon learning of the ineffective assistance of counsel and that said counsel filed a Motion to Reopen on behalf of Petitioner within a month of being hired.

The Petitioner is a victim of ineffective assistance of counsel and has presented constitutional and legal issues that should be reviewable to ensure uniformity and justice.

CONCLUSION

Wherefore, based on the foregoing, Petitioner respectfully asks that this Petition for a Writ of Certiorari be granted and that the Petitioner be granted relief.

The First Circuit panel has clearly deviated from other circuits and its own established precedent. It is within the interests of justice that this Honorable Court grants certiorari of this case.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR.,* ATTORNEY GENERAL,

Respondent.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before
Lynch, *Chief Judge*,
Torruella and Ebel,** *Circuit Judges*.

Saher Joseph Macarius with whom Audrey Botros and Law Offices of Saher Joseph Macarius were on brief for petitioner.

Stacey I. Young, Trial Attorney, Office of Immigration Litigation, Civil Division, with whom Tony

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* Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael B. Mukasey as the respondent.

** Of the Tenth Circuit, sitting by designation.

West, Assistant Attorney General, and Joshua E. Braunstein, Assistant Director, Office of Immigration Litigation, were on brief for respondent.

July 21, 2010

PER CURIAM. Kelmer Da Silva Neves, a native and citizen of Brazil, petitions for review of the Board of Immigration Appeals's (BIA) December 14, 2006, denial of his second motion to reopen proceedings. The government's efforts to remove him from the country started in 1999. We deny the petition.

Neves's second motion to reopen was time- and number-barred under 8 U.S.C. § 1229a(c)(7)(A), (C)(i) and 8 C.F.R. § 1003.2(c)(2). Save for several exceptions not at issue here, those provisions allow an alien to file only one motion to reopen proceedings based on new facts and require the alien to do so within ninety days after the final order of removal. Neves argued before the BIA that he was nonetheless entitled to equitable tolling of these filing requirements, or in the alternative that the BIA should sua sponte reopen proceedings, because of ineffective assistance of counsel. The BIA found that Neves was ineligible for equitable tolling because he had failed to show he had exercised due diligence in pursuing his claim and declined to exercise its *sua sponte* authority to reopen.

This court initially denied Neves's petition on the ground then urged by the government: that the BIA's finding of a lack of due diligence, on which the denial primarily rested, was a factual determination that federal courts lacked jurisdiction to review. *See Da Silva Neves* v. *Holder*, 568 F.3d 41, 42-43 (1st Cir. 2009) (per curiam). This court further held that it lacked jurisdiction to review the BIA's discretionary denial of *sua sponte* reopening. *Id.* at 43. Neves filed a petition for a writ of certiorari in the Supreme Court.

While Neves's petition was pending, the Supreme Court decided *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), in which it held that decisions on motions to reopen proceedings, like other proceedings made discretionary by regulation and not by statute, are generally subject to judicial review. *Id.* at 831, 840. In light of *Kucana*, in its reply brief to Neves's petition for writ of certiorari, the government abandoned its earlier jurisdictional position and recommended that the case be granted, vacated, and remanded. The Supreme Court granted certiorari and vacated and remanded the case to this court "for further consideration in light of *Kucana* v. *Holder*." *Neves* v. *Holder*, No. 09-650, 2010 WL 1946733, at *1 (U.S. May 17, 2010) (mem.).

We hold that we have jurisdiction to review the BIA's decision to deny equitable tolling of the time and number limitations governing Neves's second motion to reopen but not to review the BIA's refusal to exercise its *sua sponte* authority to reopen. Even assuming arguendo that equitable tolling of these requirements is available, the BIA did not abuse its

discretion in denying the motion. The BIA did not abuse its discretion in finding that Neves failed to show he had exercised due diligence in pursuing reopening, and substantial evidence supported that factual determination.

I.

Neves entered the United States as a B-2 visitor in 1999 and overstayed. On December 2, 1999, the Immigration and Naturalization Service (INS) issued a Notice to Appear. Neves conceded removability and applied for asylum and withholding of removal, claiming political persecution.

On November 1, 2000, an Immigration Judge (IJ) denied Neves's application for asylum and withholding of removal, finding that he was not credible on his claims of past persecution in Brazil and that his claims did not amount to persecution in any event. The IJ found Neves ineligible for voluntary departure. At this point, Neves was being represented by Joarez Reis, who had falsely represented himself as being a licensed attorney. Reis filed a notice of appeal to the BIA, and he listed as the forwarding address for correspondence a post office box that Reis had rented and that Reis had stopped checking when he fled criminal prosecution in Massachusetts. The BIA sent notice to that address.

Neves hired John Dvorak as his new attorney in June 2001, but Dvorak did not file an appearance until April 2002. On September 25, 2001, the BIA

dismissed Neves's appeal as moot. Specifically, because the BIA was unable to reach Neves by mail at the address Reis had given the court, the BIA concluded that Neves's appeal had apparently been abandoned.

Nearly two years later, on August 21, 2003, Neves filed his first motion to reopen, requesting reconsideration of the BIA's September 2001 decision and reinstatement of voluntary departure. At this point, Neves was represented by yet another attorney, Gary Yerman. Neves acknowledged that his first motion to reopen was untimely. Neves argued that the BIA should nonetheless consider the motion because the abandonment of his appeal by Reis and the delay in filing his motion to reopen were caused by the ineffective assistance of Neves's former representatives, Reis and Dvorak. Neves also admitted that he had learned of the BIA's prior order in August 2002 but waited another year to file his first motion to reopen.

On December 3, 2003, less than four months later, the BIA denied this motion as untimely and held that Neves was ineligible for equitable tolling. In addition to rejecting Neves's ineffective assistance claim, the BIA found that Neves had not exercised due diligence in pursuing his claim. A year had elapsed between August 2002, when Neves acknowledged he had learned of the BIA's September 2001 decision, and August 2003, when Neves filed his motion to reopen. The denial of this first motion to reopen was not the subject of a timely petition for review and is not before us.

Two and a half years later, on June 30, 2006, Neves filed a second motion to reopen proceedings, seeking readjustment of status under section 245(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1255(i). Now represented by another new attorney, Neves argued that the time and number limitations on his second motion should be equitably tolled, even though the motion was otherwise time- and number-barred, because of attorney Yerman's deficient performance in handling Neves's first motion to reopen.[1] Neves further claimed that he had exercised due diligence by consistently contacting Yerman between 2003 and 2006 for updates on the status of his first motion to reopen. Neves said he was informed by one of Yerman's employees that the BIA might take years to issue its decision and that he should be patient. He provided no independent corroboration of his assertions. Neves claimed he only discovered in early June 2006 that the BIA had denied his first motion to reopen in 2003.

On December 14, 2006, less than six months later, the BIA denied this second motion to reopen as time- and number-barred and found Neves ineligible for equitable tolling. Though the BIA found that Neves had substantially complied with the requirements to show ineffective assistance of counsel by

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[1] Specifically, Neves claimed Yerman failed to file appropriate documentation in support of his first motion to reopen, did not ask for appropriate relief, and failed to notify Neves of the BIA's denial of relief for three years.

Yerman, it also found that Neves had failed to demonstrate he had exercised due diligence in pursuing his claim. Neves, the BIA found, was unable to provide the dates or details of when he contacted Yerman from 2003 to 2006 or to provide "sufficient specific, relevant information to corroborate his generalized assertion of due diligence." The BIA also declined to *sua sponte* reopen the motion. This petition followed.

II.

A. Jurisdiction

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the INA by, inter alia, explicitly identifying several immigration matters "not subject to judicial review." 8 U.S.C. § 1252(a)(2); *Kucana*, 130 S. Ct. at 828. Insulated matters include any action of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C § 1252(a)(2)(B)(ii). *Kucana* held, on statutory construction and separation of powers grounds, that this exclusion from judicial review did not preclude review of decisions left to the discretion of the Attorney General by regulation and not by statute. *Kucana*, 130 S. Ct. at 831.

Two precepts relevant to this case flow from that holding. First, because motions to reopen belong to the category of decisions committed to the Attorney General's discretion by regulation, and not by statute, *Kucana* expressly held that courts generally have

jurisdiction to review the BIA's decision to grant or deny these motions. *Id.* at 840. This case therefore falls into the general category of matters over which we can exercise jurisdiction. Neves has petitioned for review of the BIA's denial of his second motion to reopen, and his petition implicates none of the other jurisdictional bars set out in 8 U.S.C. § 1252(a)(2).[2]

Second, unless barred by statute from review, denials of motions to reopen are generally subject to judicial review irrespective of whether the BIA's decision rested on a legal or constitutional ruling. The existence of a legal or constitutional question, as opposed to a factual issue, only restores jurisdiction over matters otherwise barred from review. *See* 8 U.S.C. § 1252(a)(2)(D). Courts do not lose jurisdiction to review the BIA's denial of a motion to reopen or other ordinarily reviewable matters merely because the BIA rested its conclusion upon an underlying factual determination. *See id.*

Our earlier opinion held that no legal or constitutional issues were raised by the BIA's determination that Neves's time- and number-barred motion to reopen was not subject to equitable tolling because of Neves's failure to show due diligence. *See Neves*, 568 F.3d at 42. On that basis, we held we were barred

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[2] Neves has not sought review of any of the kinds of decisions on admissibility by immigration officers insulated from review under 8 U.S.C. § 1252(a)(2)(A), and he is not removable as an aggravated felon, *see id.* § 1252(a)(2)(C).

from exercising jurisdiction to review the BIA's decision. *See id.* at 42-43. That holding, as *Kucana* makes clear, was erroneous.[3]

Kucana does not affect the subsidiary holding in our earlier opinion that federal courts lack jurisdiction to review the BIA's decision to exercise or decline to exercise its *sua sponte* authority to reopen proceedings. Such decisions are "committed to [the BIA's] unfettered discretion" by law, *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999); *see also* 8 C.F.R. § 1003.2(a), and "the very nature of the claim renders it not subject to judicial review," *Luis*, 196 F.3d at 40; *see also Caldero-Guzman* v. *Holder*, 577 F.3d 345, 348 (1st Cir. 2009). Nor does it affect our earlier determination that no constitutional claims were presented.

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[3] Several of this circuit's earlier cases also relied on this erroneous premise. *Boakai* v. *Gonzales*, 447 F.3d 1 (1st Cir. 2006), first raised this premise, though its ultimate holding of a lack of jurisdiction rested on the petitioner's status as an alien removable as an aggravated felon. *Id.* at 4. In *Fustaguio do Nascimento* v. *Mukasey*, 549 F.3d 12 (1st Cir. 2008), this court suggested that it lacked jurisdiction to review a factual determination by the BIA that a petitioner's lack of diligence made her ineligible for equitable tolling, *id.* at 18-19, but held on the merits that the BIA's factual determination was not an abuse of discretion, *id.* at 19. In *Ouk* v. *Mukasey*, 551 F.3d 82 (1st Cir. 2008), this court denied review of the alien's petition on purely jurisdictional grounds, reasoning that the BIA had made a factual determination that the alien had not exercised due diligence and was ineligible for equitable tolling. *Id.* at 83.

B. Equitable Tolling

We turn to Neves's argument that the BIA abused its discretion by refusing to allow his otherwise time- and number-barred second motion to reopen by application of equitable tolling. We review the BIA's decision to grant or deny a motion to reopen for abuse of discretion. *Vaz Dos Reis* v. *Holder*, 606 F.3d 1, 3 (1st Cir. 2010). We "uphold the agency's subsidiary findings of fact as long as they are supported by substantial evidence," *id.*, and we "set[ ] aside a decision only where it rests on an error of law or reflects arbitrary or capricious decisionmaking," *Oliveira* v. *Holder*, 568 F.3d 275, 277 (1st Cir. 2009). There was no error of law and the decision was far from arbitrary or capricious.

We assume arguendo, but do not decide, that the time and number limits on motions to reopen are subject to equitable tolling. *See Chedid* v. *Holder*, 573 F.3d 33, 37 (1st Cir. 2009) (noting that this issue remains an open question in this circuit). Even if available in this context, equitable tolling "is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007); *see also Jobe* v. *INS*, 238 F.3d 96, 100 (1st Cir. 2001) (en banc).

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also*

Holland v. *Florida*, No. 09-5327, 2010 WL 2346549, at *12 (U.S. June 14, 2010); *Neverson* v. *Farquharson*, 366 F.3d 32, 42 (1st Cir. 2004).[4]

The equitable tolling doctrine extends statutory deadlines in extraordinary circumstances for parties who were prevented from complying with them through no fault or lack of diligence of their own. *See Fustaguio Do Nascimento* v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); *Gonzalez* v. *United States*, 284 F.3d 281, 291 (1st Cir. 2002). A party seeking equitable tolling must have diligently pursued his rights for the entire period he seeks tolled, not merely once he discovers the underlying circumstances warranting tolling. *See Iavorski* v. *INS*, 232 F.3d 124, 134 (2d Cir. 2000). The BIA could conclude that Neves's failure to exercise due diligence was fatal to his equitable tolling argument.[5] *See Chedid*, 573 F.3d at 37; *see also Vaz Dos Reis*, 606 F.3d at 4 n.3.

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[4] In *Jobe*, this circuit listed five criteria for equitable tolling, which we consider as factors within the Supreme Court's two-part standard. Those criteria are "(1) a lack of actual notice of a time limit; (2) a lack of constructive notice of a time limit; (3) diligence in the pursuit of one's rights; (4) an absence of prejudice to a party opponent; and (5) the claimant's reasonableness in remaining ignorant of the time limit." 238 F.3d at 100; *see also Dawoud* v. *Holder*, 561 F.3d 31, 36 (1st Cir. 2009).

[5] We need not decide whether the ineffective assistance of counsel Neves alleged here qualified as an extraordinary circumstance. *Cf. Holland*, 2010 WL 2346549, at *13 (distinguishing between "garden variety claim[s] of excusable neglect," such as a "miscalculation" regarding a filing deadline, and "more serious instances of attorney misconduct"); *Rashid* v. *Mukasey*,

(Continued on following page)

Neves argues that the ineffective assistance of his counsel Yerman from 2003 until early June 2006, when Neves discovered Yerman's failure to apprise him of the BIA's 2003 decision, prevented him from timely seeking reopening. Neves says he exercised due diligence thereafter by filing his second motion to reopen on June 30, 2006, within one month of learning of Yerman's deficiency and the BIA's denial of his first motion to reopen.

The BIA did not base its denial of Neves's second motion to reopen on whether Neves had diligently pursued his rights after early June 2006. The BIA found that Neves failed to show that he had diligently pursued his rights before this point, from the date of the BIA's 2003 denial of his first motion to reopen through his discovery of Yerman's ineffective assistance in early June 2006.

Fatally to his claim, Neves did not timely contest the BIA's finding, and so it is waived.[6] The argument is in any event meritless. As the BIA found, neither Neves's affidavits regarding his contacts with

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533 F.3d 127, 130-31 (2d Cir. 2008) (requiring an alien to show that counsel's performance was so deficient that it violated due process).

[6] Neves challenges this finding only in his supplemental brief, arguing that the BIA wrongly concluded that no specific evidence supported his assertion of due diligence because it failed to give weight to a sworn affidavit from Yerman, Neves's previous counsel. Neves never made this argument in his original brief, and it is waived.

Yerman's office, nor Yerman's letter to Neves, provided any specific details about the employee responsible for not notifying Neves or the dates or frequency of Neves's contacts with Yerman's office regarding the status of his first motion to reopen. Substantial evidence supported the BIA's conclusion that Neves failed to show he exercised reasonable diligence during this period.

We cannot say the BIA abused its discretion in denying equitable tolling under these circumstances. *See Rashid* v. *Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008) (requiring due diligence during "both the period of time before the ineffective assistance of counsel was or should have been discovered and the period from that point until the motion to reopen is filed"); *cf. Holland*, 2010 WL 2346549, at *14 (finding reasonable diligence in a habeas case when a habeas petitioner both repeatedly contacted his deficient counsel in the period before the AEDPA deadline elapsed and also prepared his own habeas petition and filed it the day he discovered the deadline had lapsed). We need not reach respondent's alternate argument that Neves had in any event failed to show a prima facie case for readjustment of status.

The petition is *denied*.

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ERRATA SHEET

(Filed Dec. 2, 2010)

The opinion of this Court issued on July 21, 2010, is amended as follows:

On page 9, line 12, the following footnote 4 is added at the end of the sentence:

> The Supreme Court in *Kucana* stated that it "express[es] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*." *Kucana* v. *Holder*, 130 S. Ct. 827, 839 n.18 (2010). Because the Supreme Court declined to reach the issue, *Luis* is still controlling law. Further, we note that three circuits have concluded explicitly that *Kucana* does not change the prior rule on this point. *Gashi* v. *Holder*, No. 09-4200, 2010 WL 2563403, at *1

(2d Cir. June 22, 2010); *Ochoa* v. *Holder*, 604 F.3d 546, 549 & n.3 (8th Cir. 2010); *Jaimes-Aguirre* v. *U.S. Atty. Gen.*, 369 Fed. Appx. 101, 103 (11th Cir. 2010).

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 17, 2010

Mr. Saher J. Macarius
Law Offices of Saher J. Macarius
21 Walsh Street
Framingham, MA 01701

Re: Kelmer Da Silva Neves
v. Eric H. Holder, Jr., Attorney General
No. 09-650

Dear Mr. Macarius:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of Kucana v. Holder, 558 U.S. ___ (2010).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR.,* ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

Before
Lynch, *Chief Judge*,
Torruella and Ebel,** *Circuit Judges*.

Saher Joseph Macarius with whom Audrey Botros and Law Offices of Saher Joseph Macarius were on brief for petitioner.

Stacey I. Young, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, with

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* Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael B. Mukasey as the respondent.

** Of the Tenth Circuit, sitting by designation.

whom Michael F. Hertz, Acting Assistant Attorney General, and J. Max Weintraub, Senior Litigation Counsel, were on brief for respondent.

June 4, 2009

PER CURIAM. Petitioner Kelmer Da Silva Neves, a native and citizen of Brazil, petitions for review of the denial by the Board of Immigration Appeals of his second motion to reopen, which the Board denied on December 14, 2006. Neves's first motion to reopen was denied on December 3, 2003 due to his failure to exercise due diligence in seeking reopening of a September 25, 2001 decision by the Board, which dismissed his asylum appeal.

The second motion to reopen, the denial of which is now before us, was filed on June 30, 2006 and was denied by the Board as untimely and numerically barred. *See* 8 U.S.C. § 1229a(c)(7)(A); 8 C.F.R. § 1003(c)(2). Neves's second motion sought reopening of the Board's December 3, 2003 decision.

The Board rejected Neves's argument that the time and number limits should be equitably tolled so he could seek adjustment of status under § 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). *See* 8 C.F.R. § 1003.2(c)(2). The Board found that while Neves had substantially complied with the requirements to show ineffective assistance of counsel under *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988),

he nonetheless had failed to show that he exercised due diligence in seeking reopening.

We need not and do not decide whether the statutory provision limiting motions to reopen is subject to equitable tolling. Even if it were, the equitable tolling doctrine is unavailable to a party who has failed to exercise due diligence, as the BIA found here. *Boakai* v. *Gonzales*, 447 F.3d 1, 3 (1st Cir. 2006) ("[I]f the equitable tolling doctrine is available at all, the petitioner must first show that he has acted with due diligence.").

No constitutional claim or issue of law is raised by petitioner as to the Board's finding of lack of diligence, contrary to the assertions in his reply brief.[1] And where the Board has made a factual determination of lack of due diligence not raising an issue of law or a constitutional claim, under the provisions of the REAL ID Act, 8 U.S.C. § 1252(a)(2)(B)(i), (D), we have held we lack jurisdiction to review the Board's decision. *Ouk* v. *Mukasey*, 551 F.3d 82, 83-84 (1st Cir. 2008); *Fustaquio Do*

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[1] Because the BIA denial was based on a lack of diligence, the claim of ineffective assistance of counsel is not before us. Indeed, the BIA found lack of diligence even assuming counsel was ineffective. Further, even if we had jurisdiction, the ineffective assistance claim is waived. *See United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Nascimento v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); *see also Boakai*, 447 F.3d at 4.

The Board further declined to exercise its authority to sua sponte reopen. We have no jurisdiction over this latter decision. *Peralta* v. *Holder*, No. 08-2073, ___ F.3d ___, 2009 WL 1475557, at *6-8 (1st Cir. May 28, 2009); *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999).

The petition is *dismissed* for lack of jurisdiction.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A77 549 308 – Boston Date: DEC 14 2006

In re: KELMER DA SILVA *NEVES*

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Joseph Rose, Esquire

ORDER:

PER CURIAM. This case was last before the Board on December 3, 2003, when we denied the respondent's untimely motion to reopen. The respondent's prior motion to reopen was denied because, *inter alia*, the respondent failed to exercise due diligence in seeking reopening of our September 25, 2001, decision dismissing his appeal (BIA Dec. dated 12/3/03). *See Jobe v. INS*, 238 F.3d 96, 98-99 (1st Cir. 2001). On June 30, 2006, the respondent filed his second motion to reopen. The motion is untimely and number-barred. *See* 8 C.F.R. § 1003.2(c)(2). The respondent contends that the time and number limits for filing his motion should be equitably tolled because he received ineffective assistance of counsel. The respondent has substantially complied with the requirements of *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988). The respondent requests that his proceeding be reopened and

the record remanded so that he may seek adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i).

The respondent failed to demonstrate, however, that he exercised due diligence in seeking reopening. *See Jobe v. INS*, *supra*. *See also Chen v. Gonzales*, 415 F.3d 151, 154 (1st Cir. 2005). The respondent claims that 3 years after his former attorney, Gary Yerman, filed a motion to reopen, he went to Mr. Yerman's office in June 2006 and learned that the motion had been denied during December 2003. The respondent alleges that he had frequently contacted Mr. Yerman's office to inquire about the status of the motion and was advised to be patient. The respondent also included a letter from Mr. Yerman, which states that the employee who allegedly failed to notify him of the denial was fired. The respondent and Mr. Yerman fail, however, to identify the particular employee responsible for notifying the respondent. Further, the respondent has not provided the dates that he contacted his former attorney's office from 2003 to 2006, or who he spoke to when he contacted the office. In short, the respondent has not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence.

Further, we decline to exercise our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (fundamental change in law may warrant *sua sponte* reopening notwithstanding otherwise applicable time and number limitations on motions); *Matter of J-J-*, 21 I&N Dec. 976 (BIA

1997) (Board retains limited discretionary power under the regulations to reopen or reconsider only in exceptional circumstances). Accordingly, the motion is denied.

/s/ Frederick D. Hess
FOR THE BOARD

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES

Petitioner

v.

ERIC H. HOLDER, Attorney General

Respondent

Before
Lynch, *Chief Judge*,
Torruella, Ebel,* Boudin, Lipez,
Howard and Thompson, *Circuit Judges*.

ORDER OF COURT

Entered: **December 2, 2010**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en bane be *denied*.

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* Of the Tenth Circuit, sitting by designation.

By the Court:
/s/ Margaret Carter, Clerk

cc:
LaTia N. Bing
Mary A. Kenney
Saher Joseph Macarius
Beth Werlin
Stacey Ilene Young
Kelmer Da Silva Neves

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 5 Section 701(a) of the United States Code provides in relevant part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that –
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

Title 8 Section 1252 of the United States Code provides in relevant part:

> (a) Applicable provisions
>
> (1) General orders of removal an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.
>
> (2)
>
> * * *
>
> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal

proceedings, no court shall have jurisdiction to review –

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(D) Judicial review of certain legal claims Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision

of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

* * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or

Title 8 Section 1003.2(a) of the Code of Federal Regulations provides in relevant part:

> (a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

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(2)

No. 10-1030

In the Supreme Court of the United States

KELMER DA SILVA NEVES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Board of Immigration Appeals' decision not to exercise its discretionary authority to reopen petitioner's immigration proceedings *sua sponte* is unreviewable.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Ali v. *Gonzales*, 448 F.3d 515 (2d Cir. 2006) 22
Arai, In re, 13 I. & N. Dec. 494 (B.I.A. 1970) 3
Argueta v. *Holder*, 617 F.3d 109 (2d Cir. 2010) 25
Barry v. *Mukasey*, 524 F.3d 721 (6th Cir. 2008) 22
Belay-Gebru v. *INS*, 327 F.3d 998 (10th Cir. 2003) 22, 26
Bernal-Vallejo v. *INS*, 195 F.3d 56 (1st Cir. 1999) 25, 18
Boakai v. *Gonzales*, 447 F.3d 1 (1st Cir. 2006) 9
Calle-Vujiles v. *Ashcroft*, 320 F.3d 472 (3d Cir. 2003) 22
Cardoso-Tlaseca v. *Gonzales*, 460 F.3d 1102 (9th Cir. 2006) 25
Cevilla v. *Gonzales*, 446 F.3d 658 (7th Cir. 2006) 26
Cheng Fan Kwok v. *INS*, 392 U.S. 206 (1968) 16
Cruz v. *Attorney Gen. of U.S.*, 452 F.3d 240 (3d Cir. 2006) 26
Dada v. *Mukasey*, 554 U.S. 1 (2008) 15, 17
Ekimian v. *INS*, 303 F.3d 1153 (9th Cir. 2002) 22
Elkins v. *Moreno*, 435 U.S. 647 (1978) 3
Enriquez-Alvarado v. *Ashcroft*, 371 F.3d 246 (5th Cir. 2004) 22

Cases—Continued: Page

Fustaguio Do Nascimento v. *Mukasey*, 549 F.3d 12 (1st Cir. 2008) 9
Gashi v. *Holder*, 382 Fed. Appx. 21 (2d Cir. 2010) 22
G-D-, In re, 22 I. & N. Dec. 1132 (B.I.A. 1999) 5
Gor v. *Holder*, 607 F.3d 180 (6th Cir. 2010), petition for cert. pending, No. 10-940 (filed Jan. 18, 2011) 14, 22
Heckler v. *Chaney*, 470 U.S. 821 (1985) 13, 14
INS v. *Abudu*, 485 U.S. 94 (1988) 4
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 2
INS v. *Doherty*, 502 U.S. 314 (1992) 4
Jaimes-Aguirre v. *United States Att'y Gen.*, 369 Fed. Appx. 101 (11th Cir. 2010) 22
J-J-, In re, 21 I. & N. Dec. 976 (B.I.A. 1997) 29
Kucana v. *Holder*, 130 S. Ct. 827 (2010) 9, 10, 18, 19, 22, 23
Lenis v. *United States Att'y Gen.*, 525 F.3d 1291 (11th Cir. 2008) 14, 22, 27
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 13
Luis v. *INS*, 196 F.3d 36 (1st Cir. 1999) . . . . . *passim*
Mejia-Hernandez v. *Holder*, 633 F.3d 818 (9th Cir. 2011) 22
Mendiola v. *Holder*, 585 F.3d 1303 (10th Cir. 2009) 25
Mosere v. *Mukasey*, 552 F.3d 397 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009) 22, 26
Nawaz v. *Holder*, 314 Fed. Appx. 736 (5th Cir. 2009) 25

Cases—Continued: Page

Ochoa v. *Holder*, 604 F.3d 546 (8th Cir. 2010), petition for cert. pending, No. 10-920 (filed Jan. 18, 2011) 22
Ouk v. *Mukasey*, 551 F.3d 82 (1st Cir. 2008) 9
Ozeury v. *Attorney Gen.*, 400 Fed. Appx. 647 (3d Cir. 2010) 22
Peralta v. *Holder*, 567 F.3d 31 (1st Cir. 2009) 9
Pilch v. *Ashcroft*, 353 F.3d 585 (7th Cir. 2003) 22
Pllumi v. *Attorney Gen.*, No. 09-4454, 2011 WL 1278741 (3d Cir. Apr. 6, 2011) 22, 26
Patel, In re, 17 I. & N. Dec. 597 (B.I.A. 1980) 3
Pierre, In re, 15 I. & N. Dec. 461 (B.I.A. 1975) 2
Rosario v. *Holder*, 627 F.3d 58 (2d Cir. 2010) 24
Sharma v. *Holder*, 633 F.3d 865 (9th Cir. 2011) 22
Stone v. *INS*, 514 U.S. 386 (1995) 15, 16
Tamenut v. *Mukasey*, 521 F.3d 1000 (8th Cir. 2008) 13, 19, 22, 27
United States v. *Ryan-Webster*, 353 F.3d 353 (4th Cir. 2003) 30
Zhang v. *Holder*, 617 F.3d 650 (2d Cir. 2010) 17, 18

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701(a)(2) . . . 13, 22
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-593 17
Immigration Act of 1952, Pub. L. No. 82-414, ch. 414, 66 Stat. 163:
§ 103(a), 66 Stat. 173 16

Statutes and regulations—Continued: Page

Immigration and Nationality Act, 8 U S C 1101 *et seq* 2
8 U S C 1101(a)(42)(A) 2
8 U.S.C. 1158(b)(1) 2, 11
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1158(b)(1)(B)(i) 2
8 U.S.C. 1182(a)(5)(A)(i) 29
8 U.S.C. 1227(a)(1)(B) 5
8 U.S.C. 1229a(c)(7) 8, 9, 12, 13, 19, 29
8 U.S.C. 1229a(c)(7)(A) 4
8 U.S.C. 1229a(c)(7)(B) 3, 4
8 U.S.C. 1229a(c)(7)(C) 12
8 U.S.C. 1229a(c)(7)(C)(i) 4
8 U.S.C. 1231(b)(3)(A) 2
8 U.S.C. 1252 16
8 U.S.C. 1252(a) 20
8 U.S.C. 1252(a)(2)(B) 9, 12, 25, 27
8 U.S.C. 1252(a)(2)(B)(ii) 10, 18, 19, 20
8 U.S.C. 1252(a)(2)(C) 26
8 U.S.C. 1252(a)(2)(D) . . . . . *passim*
8 U.S.C. 1252(b)(1) 11
8 U.S.C. 1252(b)(6) 15, 16
8 U.S.C. 1255 (2006 & Supp. III 2009) 3
8 U.S.C. 1255(a)(2) 3
8 U.S.C. 1255(a)(3) 3
8 U.S.C. 1255(i) 7
8 U.S.C. 1255(i)(2) 29

Statutes and regulations—Continued: Page

8 U.S.C. 1255(i)(2)(A) 3
8 U.S.C. 1255(i)(2)(B) 3
8 C.F.R.:
Section 1003.1(e)(4) 3
Section 1003.2(a) 4
Section 1003.2(c) 3, 4
Section 1003.2(c)(1) 3, 4
Section 1003.2(c)(2) 4, 6, 8
Section 1003.2(d) 25
Section 1003.23(b) 3
Section 1003.23(b)(1) 4
Section 1003.23(b)(3) 4
Section 1208.13(a) 2
Section 1240.8(d) 2

Miscellaneous:

17 Fed. Reg. 11,475 (1952) 17
23 Fed. Reg. 9118-9119 (1958) 17
61 Fed. Reg. (1996):
p. 18,900 17
p. 18,905 17

In the Supreme Court of the United States

No. 10-1030

KELMER DA SILVA NEVES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-13) is reported at 613 F.3d 30. A prior relevant decision of the court of appeals (Pet. App. 18-21) is reported at 568 F.3d 41. The decision of the Board of Immigration Appeals (Pet. App. 22-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2010 (Pet. App. 2). A petition for rehearing was denied on December 2, 2010 (Pet. App. 25-26). The petition for a writ of certiorari was filed on February 14, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975).

b. The INA also provides that the Attorney General and the Secretary of Homeland Security may, in their discretion, adjust the status of an alien inspected and

admitted into the United States to that of a lawful permanent resident. 8 U.S.C. 1255 (2006 & Supp. III 2009). Several prerequisities must be met, including that the alien must be "eligible to receive an immigrant visa" and "admissible to the United States for permanent residence," and that "an immigrant visa [must be] immediately available to [the alien] at the time his application [for adjustment] is filed." 8 U.S.C. 1255(a)(2) and (3), 1255(i)(2)(A) and (B).

Even if all of the statutory prerequisities are met, adjustment of status is not automatic. "The grant of an application for adjustment of status under [8 U.S.C. 1255] is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). See also, *e.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978) (Adjustment of status is "a matter of grace, not right."). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

c. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), 1003.23(b) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary

material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). When the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see 8 C.F.R. 1003.23(b)(3) (IJ). An alien is entitled to file only one such motion to reopen, and it generally must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJs and the Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJs); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If the alien fails to file a timely motion to reopen, he may suggest to the IJ or Board that his case should be reopened *sua sponte*. The IJ or the Board may exercise discretion to reopen an alien's case *sua sponte* at any time. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an ex-

traordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Petitioner is a native and citizen of Brazil. Pet. App. 19. The former Immigration and Naturalization Service charged him with being removable as an alien who remained in the United States beyond the time permitted. Administrative Record (A.R.) 115; see 8 U.S.C. 1227(a)(1)(B). Petitioner conceded that he is removable but sought asylum, withholding of removal, and voluntary departure. A.R. 115-116.

After a hearing, an IJ found petitioner removable as charged and denied his applications for asylum, withholding of removal, and voluntary departure. A.R. 115-121. Petitioner had contended that he would be subject to persecution in Brazil because he was threatened and beaten by a nightclub owner when he worked as an investigator for the state-owned electric company. A.R. 116-117. The IJ found that petitioner was not a credible witness based on his demeanor and the implausibility of his story. A.R. 118. The IJ further determined that "even if everything [petitioner] testified to is * * * believed," petitioner failed to carry his burden of showing eligibility for asylum or withholding of removal. A.R. 119. The IJ explained that petitioner "worked for the government of Brazil" and "[c]learly * * * does not fear any harm from the government," and that there was no evidence to suggest that petitioner would be harmed in Brazil "on account of one of the five statutory grounds." *Ibid.* The IJ also denied petitioner's request for voluntary departure because petitioner had not satisfied one of the statutory prerequisites for that privilege (one year of physical presence in the United States). A.R. 120.

The Board dismissed petitioner's appeal. A.R. 85. The Board explained that petitioner "appear[ed] to have * * * abandoned" his appeal and that the Clerk's Office's "[e]fforts * * * to reach [petitioner] by mail have been unsuccessful" and that it "lack[s] an address to which mail can effectively be sent." *Ibid.* The Board stated that it would send its decision to petitioner's last known address and that, if petitioner filed a timely motion to reconsider, it would consider reinstating the appeal. *Ibid.* The Board also stated that, "[p]ursuant to the Immigration Judge's order," petitioner would be permitted to voluntarily depart from the United States within 30 days. *Ibid.*

3. In August 2003, nearly two years after the Board dismissed his appeal, petitioner filed a motion to reopen his immigration proceedings. A.R. 57-65. He contended that his first attorney had been ineffective by failing to pursue his appeal before the Board and that a second attorney he had secured had been ineffective because that attorney had failed to notify the Board that he was the new counsel of record and had failed to obtain an approved labor certification for petitioner, which would have been a basis for seeking adjustment of status. A.R. 58-63. Petitioner contended that, as a remedy for his attorneys' errors, he should be granted voluntary departure. A.R. 63-64.

The Board denied the motion to reopen. A.R. 51. It explained that the motion to reopen was untimely, because under 8 C.F.R. 1003.2(c)(2), such a motion must be filed within 90 days of the Board's decision. *Ibid.* The Board then determined that petitioner's ineffective assistance of counsel claim did not excuse his untimely filing. *Ibid.* The Board explained that, "[d]espite [the] assertions against two individuals he claims acted as his

representatives, [petitioner] appeared pro se on appeal and the record contains no evidence that a representative had any involvement in this case after the removal hearing." *Ibid.* In any event, the Board determined, equitable tolling of the 90-day deadline was not available because petitioner did not exercise due diligence in seeking reopening. *Ibid.* The Board explained that petitioner "admits that he learned of the Board's prior order in August, 2002," yet did not file his motion to reopen until a year later, in August 2003. *Ibid.* Finally, the Board declined to reinstate the voluntary departure order, noting that the IJ had found petitioner ineligible for that privilege and that the Board's prior statement regarding voluntary departure thus had been "made in error." *Ibid.* Petitioner did not seek further review of that decision by the Board.

4. In June 2006, almost five years after the Board's initial decision, petitioner filed a second motion to reopen proceedings. A.R. 7-17. Petitioner contended that reopening was justified so that he could seek adjustment of status under 8 U.S.C. 1255(i) based on his assertion that he was the beneficiary of an approved labor certification. A.R. 17. Petitioner argued that the time and numerical limitations for motions to reopen should not bar his motion because his prior attorneys (including his third attorney, who filed the first motion to reopen) had been ineffective, and that his third attorney had failed to advise him that his prior motion to reopen had been denied. A.R. 11, 14-15, 39. Petitioner further alleged that it was not until June 2006 that he learned that the Board had denied his first motion to reopen in December 2003. *Ibid.* In the alternative, petitioner requested that the Board exercise its discretionary authority to reopen his case *sua sponte*. A.R. 11.

The Board denied petitioner's second motion to reopen. Pet. App. 22-24. The Board observed that petitioner's motion was "untimely and number-barred" under 8 C.F.R. 1003.2(c)(2), and it again determined that petitioner failed to show that he exercised due diligence that would justify equitable tolling. Pet. App. 22. In particular, the Board noted that although petitioner alleged that he frequently contacted his attorney's office between the time the motion to reopen was filed in 2003 and when he learned of its denial in 2006, he did not "provide[] the dates that he contacted his former attorney's office from 2003 to 2006, or who he spoke to when he contacted the office." *Id.* at 23. The Board also noted that, although petitioner asserted that the employee in his attorney's office who failed to notify him of the Board's action had been fired, petitioner failed "to identify the particular employee responsible for notifying" him. *Ibid.* Thus, the Board determined, petitioner had "not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence." *Ibid.* Finally, the Board declined to exercise its discretionary authority to reopen petitioner's case on its own motion. *Id.* at 23-24.

5. The court of appeals dismissed petitioner's petition for review in a per curiam opinion. Pet. App. 18-21. The court held that petitioner's second motion to reopen was both untimely and number barred under 8 U.S.C. 1229a(c)(7) and 8 C.F.R. 1003.2(c)(2). Pet. App. 19. The court then observed that, even if equitable tolling applied to those limitations (a question it did not decide), the Board had determined that tolling was not warranted because petitioner failed to demonstrate due diligence. *Id.* at 20. The court determined that, based on its prior precedents, it lacked jurisdiction under

8 U.S.C. 1252(a)(2)(B) to review the Board's factual determination that he failed to exercise due diligence, where, as the court found to be the case here, the challenge did not raise any constitutional or legal claim. Pet. App. 20-21 (citing *Ouk* v. *Mukasey*, 551 F.3d 82, 83-84 (1st Cir. 2008); *Fustaquio Do Nascimento* v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); and *Boakai* v. *Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006)).[1]

Because petitioner had not filed a timely motion to reopen under 8 U.S.C. 1229a(c)(7), petitioner had argued in the alternative that the Board should reopen his case *sua sponte*. Pet. C.A. Br. 13-15. Relying on its prior precedent, the court held that the Board's decision not to reopen a case *sua sponte* was unreviewable. Pet. App. 21 (citing *Peralta* v. *Holder*, 567 F.3d 31 (1st Cir. 2009), and *Luis* v. *INS*, 196 F.3d 36 (1st Cir. 1999)).

6. Petitioner filed a petition for a writ of certiorari. With respect to the question whether the court of appeals had jurisdiction to review the Board's determination that petitioner failed to exercise due diligence, the government argued that the court of appeals erred and recommended that the Court grant the petition, vacate the decision below, and remand to the court of appeals for further consideration in light of *Kucana* v. *Holder*, 130 S. Ct. 827 (2010). 09-650 Br. in Opp. 10, 11-14, 20. With respect to the question whether the Board's decision not to reopen petitioner's case *sua sponte* was judicially reviewable, the government argued that the court

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[1] The court of appeals did not pass on petitioner's ineffective assistance of counsel claim; it noted that, because the Board's denial of reopening was based on lack of due diligence, that claim was not before the court, and it determined, in any event, that petitioner had waived any such argument. Pet. App. 20 n.1.

of appeals' decision was correct and consistent with the unanimous view of the courts of appeals. *Id.* at 17-19.

This Court granted the certiorari petition, vacated the decision below, and remanded the case to the court of appeals for further consideration in light of *Kucana* v. *Holder*, *supra*. 130 S. Ct. 3273 (2010).

7. On remand, the court of appeals denied the petition for review in a per curiam opinion. Pet. App. 1-13. The court considered the effect of *Kucana* on its prior decision, and concluded that it had jurisdiction to review the Board's determination that equitable tolling of the time and number limitations on motions to reopen was not warranted because petitioner failed to exercise due diligence. *Id.* at 7-8. The court then determined, on the merits, that the Board had not abused its discretion in deciding that those limitations would not be equitably tolled. *Id.* at 10-13.

The court also reaffirmed its earlier holding that the Board's decision not to exercise its discretion to reopen proceedings *sua sponte* was unreviewable. Pet. App. 8-9. The court explained that "*Kucana* does not affect the subsidiary holding in our earlier opinion that federal courts lack jurisdiction to review the [Board's] decision to exercise or decline to exercise its *sua sponte* authority to reopen proceedings," *id.* at 9, because *Kucana* concerned a specific statutory provision that precludes judicial review in certain circumstances, 8 U.S.C. 1252(a)(2)(B)(ii), while decisions to deny *sua sponte* reopening are unreviewable for a different reason, which is that they are "committed to [the Board's] unfettered discretion" by law, and "the very nature of the claim renders it not subject to judicial review," Pet. App. 8-9 (quoting *Luis*, 196 F.3d at 40). The court also reaffirmed its earlier determination that petitioner did not

present any constitutional claims or questions of law. *Ibid.*

8. Petitioner filed a petition for rehearing en banc, which was denied. Pet. App. 25.

ARGUMENT

Petitioner contends (Pet. 9-25) that the court of appeals erred in holding that the Board's decision not to exercise its discretion to reopen his case *sua sponte* is unreviewable. The court of appeals' decision is correct, and it does not conflict with any decision of another court of appeals or of this Court. Moreover, this case would present a poor vehicle to review the question presented, because even if a Board decision not to reopen a case *sua sponte* were reviewable, the Board acted well within its broad discretion in denying petitioner's second request for reopening, which was filed nearly five years after his removal order became final. Further review is therefore unwarranted.[2]

1. At issue in this case is the Board's decision not to reopen petitioner's case *sua sponte* in response to petitioner's second request for reopening, which was made in 2006, nearly five years after his removal order became final. After an IJ found him removable and denied his requests for asylum, withholding of removal, and voluntary departure, A.R. 115-121, petitioner filed an appeal with the Board and then abandoned it, A.R. 85. After the Board dismissed his appeal, petitioner did not seek judicial review. See 8 U.S.C. 1252(a) and (b)(1) (authorizing judicial review of final removal orders). He

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[2] The question presented in this case is also presented in the pending petitions in *Ochoa* v. *Holder*, petition for cert. pending, No. 10-920 (filed Jan. 18, 2011), and *Gor* v. *Holder*, petition for cert. pending, No. 10-940 (filed Jan. 18, 2011).

also did not file a motion to reopen immigration proceedings within the parameters Congress specified. See 8 U.S.C. 1229a(c)(7)(C) (motion to reopen generally must be filed within 90 days of final removal order). Instead, two years after his removal order became final, petitioner asked the Board to reopen his case and grant him voluntary departure. A.R. 57-65. Two and one-half years after that motion had been denied, petitioner again requested reopening from the Board, seeking an entirely different form of relief, adjustment of status. A.R. 7-17. In this second request for reopening, petitioner argued that his request should be treated as a motion to reopen that complies with the statutory prerequisites, see 8 U.S.C. 1229a(c)(7), because although it was untimely and number-barred, equitable tolling was warranted, A.R. 14-15; and that if his submission was not treated as a motion to reopen filed pursuant to 8 U.S.C. 1229a(c)(7), the Board should exercise its discretion to reopen his case *sua sponte*, A.R. 11.

At this point, only petitioner's request that the Board reopen his case *sua sponte* is at issue; petitioner no longer argues that his submission should be characterized as a motion to reopen that complies with 8 U.S.C. 1229a(c)(7). The Board had determined that petitioner's second request for reopening was untimely and number-barred; that petitioner had not made a sufficient showing to warrant equitable tolling of those statutory limitations (if equitable tolling even is available); and that this was not an extraordinary case warranting an exercise of its *sua sponte* reopening authority. Pet. App. 22-23. The court of appeals agreed that petitioner's request was untimely and number-barred, but initially thought that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B) to review the Board's decision that petitioner had not

demonstrated the due diligence necessary for equitable tolling. Pet. App. 20-21. On remand from this Court, the court of appeals held that it did have jurisdiction to review the Board's due diligence determination, *id.* at 7-8, but that the Board had not abused its discretion in concluding that equitable tolling was unwarranted, *id.* at 10-13. In both of its decisions, the court of appeals held that the Board's decision not to reopen petitioner's case *sua sponte* was unreviewable, and that petitioner did not raise any question of law or constitutional claim. *Id.* at 8-9, 20-21. In his new certiorari petition, petitioner does not challenge the court's holding that he did not file a timely motion to reopen under 8 U.S.C. 1229a(c)(7) and that he had not made a showing to support equitable tolling; he seeks review only on the question whether the Board's decision not to reopen his case *sua sponte* is judicially reviewable. See Pet. 9-25.

a. The court of appeals correctly recognized that the Board's decision not to exercise its authority to reopen proceedings *sua sponte* is not judicially reviewable because it is committed to the Board's discretion by law. Under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2); see *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993); *Heckler* v. *Chaney*, 470 U.S. 821, 829-831 (1985). That is true with respect to *sua sponte* reopening, because the decision whether to reopen a case is entirely discretionary and there are no meaningful standards or guidelines to review the Board's decision. Pet. App. 9; see, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) (per curiam) (en banc). As the court of appeals previously has explained, "the decision of the [Board] whether to invoke its *sua sponte* authority is committed to its

unfettered discretion"; "the very nature of the claim renders it not subject to judicial review." *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999). The Board's regulation addressing *sua sponte* reopening provides "no guidelines or standards which dictate how and when the [Board] should invoke its *sua sponte* power," and when "'no judicially manageable standards are available for judging how and when an agency should exercise its discretion,'" courts cannot review the agency's actions for abuse of discretion. *Ibid.* (quoting *Heckler*, 470 U.S. at 830). The regulation does not require the Board to reopen a removal proceeding under any particular circumstances. Rather, it simply provides the Board the discretion to reopen proceedings if and when it elects to do so.

Furthermore, unlike the statutory and regulatory provisions allowing an alien to file one motion to reopen, the regulation permitting the Board to reopen a case *sua sponte* establishes a procedural mechanism for the Board itself in aid of its own internal administration. Neither Congress nor the regulation allowing *sua sponte* reopening has conferred any privately enforceable rights on an alien in this setting. See *Gor* v. *Holder*, 607 F.3d 180, 195 (6th Cir. 2010) (Batchelder, C.J., concurring) ("[t]he power of the [Board] to reopen *sua sponte* arises only from its own regulations"; "Congress has taken no steps to establish an individual right applicable to [aliens]"), petition for cert. pending, No. 10-940 (filed Jan. 18, 2011); *Lenis* v. *United States Att'y Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008) (the regulation permitting *sua sponte* reopening "merely provides the [Board] the discretion to reopen immigration proceedings as it sees fit") (citation omitted).

Moreover, the purposes of the INA, and of its judicial review provisions, would be undermined if decisions by the Board not to exercise its discretionary *sua sponte* reopening authority were subject to judicial review. Congress enacted statutory provisions governing motions to reopen and judicial review in 1990 and 1996 in order to prevent abuses of motions to reopen by imposing time and numerical limitations on such motions, shortening the time for judicial review, and requiring the consolidation of petitions for judicial review of the denials of motions to reopen with the petition for review of the final order of removal (see 8 U.S.C. 1252(b)(6)). Those changes were adopted for the purpose of expediting the process of administrative and judicial review, the final resolution of removal proceedings, and the actual removal of the alien. See *Dada* v. *Mukasey*, 554 U.S. 1, 12-15 (2008); *Stone* v. *INS*, 514 U.S. 386, 393-394 (1995). A determination by the Board not to exercise its discretion to reopen a case *sua sponte* may be made months or (as here) years after the order of removal became final, the time for filing a motion to reopen has expired (or such a motion has been denied), and the time for judicial review has expired. If such determinations were then judicially reviewable, the result would be to circumvent the limitations Congress imposed on judicial review. An alien, simply by requesting an IJ or the Board to reopen a case *sua sponte*, could thereby trigger one or more new rounds of judicial review, perhaps seeking stays of removal, and creating delays and congestion in the courts. The potential for those consequences weighs heavily against recognizing a right of judicial review.

This case proves the point: although the government began removal proceedings in 1999, Pet. App. 2, petitioner's case is still ongoing because, after abandoning

the appeal of his removal order, he filed two requests for reopening, both long after his removal order became final, and raising different arguments each time.[3]

The conclusion that the Board's decision not to reopen a case *sua sponte* is unreviewable is strongly supported by the history of the Board's *sua sponte* reopening authority. Congress enacted the INA in 1952, see Pub. L. No. 82-414, § 103(a), 66 Stat. 163, 173, charging the Attorney General "with the administration and en-

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[3] Indeed, there is substantial reason to question whether Congress contemplated that a Board decision not to reopen proceedings *sua sponte* is the sort of decision over which a court of appeals would even have *jurisdiction* when it authorized judicial review of final removal orders in 8 U.S.C. 1252. The INA provides an alien with the right to file one motion to reopen, subject to specified time and other limits; it makes sense that Congress would have expected that denials of such motions would be judicially reviewable in light of the fact that Congress authorized such motions by statute. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968) (predecessor statute to Section 1252 contemplated judicial review of "only those determinations made during a [removal] proceeding," "including those determinations made incident to a *motion* to reopen such proceedings") (emphasis added); 8 U.S.C. 1252(b)(6) (judicial review of "*motion* to reopen or reconsider" shall be consolidated with petition for review of an underlying removal order) (emphasis added). But an alien has no personal right in connection with *sua sponte* reopening of final removal proceedings. It therefore is not obvious that Section 1252 contemplates jurisdiction over a petition seeking review of the Board's exercise of its own discretion on such matters, which occurs after a removal order has become final and the alien has no right to further agency review. That is especially so because to authorize judicial review of decisions not to reopen a case *sua sponte* would extend immigration proceedings substantially, contrary to the need for finality that Congress has recognized in several provisions in the INA. See *Stone*, 514 U.S. at 399-400 (noting Congress's concern that "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States" (internal quotation marks omitted)).

forcement" of the Act, and authorized him to "establish such regulations * * * as he deems necessary for carrying out [that] authority." Pursuant to that authority, the Attorney General promulgated a series of regulations defining the"[p]owers of the Board," which included the power to "reopen * * * any case in which a decision has been made by the Board." 17 Fed. Reg. 11,475, §§ 6.1(b) and (d), 6.2 (1952). In 1958, the Attorney General clarified that the Board may reopen proceedings in response to a motion by the parties or on its own motion. See 23 Fed. Reg. 9118-9119, § 3.2; see also *Zhang* v. *Holder*, 617 F.3d 650, 656 (2d Cir. 2010).

Congress has addressed motions to reopen filed by aliens, but it has never addressed the Board's *sua sponte* reopening power. In 1990, Congress became concerned that aliens illegally present in the United States were filing motions to reopen to prolong their stay, and it directed the Attorney General to issue regulations to limit the number of motions to reopen an alien may file and the time period for filing such motions. See *Dada*, 554 U.S. at 13. After the Attorney General promulgated those regulations, see 61 Fed. Reg. 18,900, 18,905 (1996), Congress codified key portions of them, providing that each alien may file one motion to reopen, subject to specified time and other limits. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-593. Notably, Congress said nothing about the Board's *sua sponte* reopening authority. Thus, although Congress has provided aliens with a personal right under the INA to file one motion to reopen within the time limit specified, it has "taken no steps to establish an individual right" for aliens to seek or obtain *sua sponte* reopening, instead leaving that discretionary mechanism

entirely to the Board, see *Zhang*, 617 F.3d at 662 (noting that although Congress codified standards for timely motions to reopen based on new evidence, it "was silent as to * * * the [Board's] *sua sponte* authority"). Accordingly, the Board's decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law and is not reviewable by a court.

b. Petitioner makes essentially two arguments about how in his view the court of appeals erred. First, he contends that after this Court's recent decision in *Kucana* v. *Holder*, 130 S. Ct. 827, 834 (2010), *all* Board decisions not to reopen a case *sua sponte* are judicially reviewable. Pet. 12-17. Second, he argues that even if such decisions generally are not judicially reviewable, the Board's decision not to exercise its *sua sponte* authority in *his* case is reviewable under 8 U.S.C. 1252(a)(2)(D) because it raises a constitutional claim or question of law. Pet. 18-25. Neither argument is correct.

i. Petitioner is mistaken in arguing that all decisions by the Board not to exercise its *sua sponte* authority are judicially reviewable after *Kucana*. As petitioner himself recognizes (Pet. 6), *Kucana* did not address judicial review of a denial of *sua sponte* reopening. The question in *Kucana* was one of statutory interpretation: whether 8 U.S.C. 1252(a)(2)(B)(ii), which states that no court shall have jurisdiction to review any action of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General," applies to actions the discretionary authority for which is specified in *regulations*, rather than the relevant statutory subchapter. 130 S. Ct. at 831. The Court concluded that Section 1252(a)(2)(B)(ii) does not bar judicial review of determinations that are

made discretionary by regulation, such as determinations on an alien's motion to reopen under 8 U.S.C. 1229a(c)(7). 130 S. Ct. at 836-837.

In the decision below, the reviewability of the Board's decision not to reopen petitioner's case *sua sponte* did not depend on Section 1252(a)(2)(B)(ii), the statutory provision at issue in *Kucana*. Instead, the court of appeals held that the Board's decision not to reopen a case *sua sponte* is unreviewable because it is committed to agency discretion by law, an issue that was not addressed in *Kucana*. Pet. App. 9 (citing *Luis* v. *INS*, *supra*); see Pet. 12 (recognizing court's rationale). Indeed, the *Kucana* Court specifically stated that it "express[ed] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*," while noting that 11 courts of appeals had held that "such decisions are unreviewable because *sua sponte* reopening is committed to agency discretion by law." 130 S. Ct. at 839 n.18 (citing *Tamenut*, 521 F.3d at 1003-1004); see Pet. App. 14.[4]

Contrary to petitioner's contention (Pet. 12-14), *Kucana*'s logic does not lead to the conclusion that denials of *sua sponte* reopening are reviewable. The answer to that question turns on whether the regulation authorizing *sua sponte* reopening confers private rights and whether it imposes standards to guide agency decisionmaking. By contrast, the issue in *Kucana* was whether the exercise of jurisdiction to review the denial of a *motion* to reopen, which the alien had a personal statutory

[4] Petitioner is wrong to suggest (Pet. 14-15) that either the government or the court of appeals relied on the theory that Board decisions not to reopen a case *sua sponte* are unreviewable because of 8 U.S.C. 1252(a)(2)(B)(ii). Such decisions are unreviewable because they are committed to agency discretion by law.

right to file, was precluded by a certain statutory provision, 8 U.S.C. 1252(a)(2)(B)(ii). The Court's interpretation of the statute at issue in *Kucana* simply does not speak to the question whether the decision to reopen a case *sua sponte* is committed to agency discretion and is for that reason unreviewable. Therefore, nothing in the *Kucana* Court's holding or rationale supports judicial review of Board decisions not to exercise *sua sponte* reopening authority.

ii. Alternatively, petitioner contends (Pet. 18-25) that even if decisions not to reopen *sua sponte* generally are unreviewable because they are committed to agency discretion by law, courts may review the Board's decision not to reopen his case *sua sponte* because he raised a "constitutional question" or "issue of law." Petitioner's argument rests on 8 U.S.C. 1252(a)(2)(D), which provides:

> Nothing in subparagraph (B) or (C) [of 8 U.S.C. 1252(a)], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Ibid.

Section 1252(a)(2)(D) does not apply here. By its plain text, Section 1252(a)(2)(D) provides a rule of construction for certain provisions of the INA that "limit[] or eliminate[] judicial review." 8 U.S.C. 1252(a)(2)(D). Denials of *sua sponte* reopening are not made unreviewable due to a provision in Section 1252(a) or elsewhere in Chapter 12 of Subchapter II of Title 8. In-

stead, they are unreviewable as committed to agency discretion by law, because the regulations allowing the Board to reopen or reconsider a case on its *own* motion create no privately enforceable right and because there are no judicially manageable standards to evaluate the agency's exercise of its discretion. See pp. 13-18, *supra*. Because Section 1252(a)(2)(D) is inapplicable here by its terms, it lends no support to petitioner's argument that the Board's decision not to exercise its *sua sponte* reopening discretion is judicially reviewable.

Moreover, the very nature of *sua sponte* reopening makes it unreviewable, and that does not change based on the types of claims the alien presents. The Board may choose not to reopen a case for a variety of reasons, and the Board is not required to explain why it does not exercise its discretionary *sua sponte* reopening authority. Although the Board often does give reasons for such a decision for the benefit of the parties, the Board's decision to do so should not then make its decision subject to judicial review. If the courts were to hold that the reviewability of determinations not to reopen a case *sua sponte* turned on the reasons the Board gave for such decisions, it would create a substantial disincentive for the Board to explain those rulings for the benefit of the parties. For that reason as well, the court of appeals was correct to find petitioner's claim unreviewable.

2. Contrary to petitioner's contention (Pet. 9-12), the decision below does not conflict with any decisions from other circuits regarding whether decisions not to reopen a case *sua sponte* are judicially reviewable.

a. The courts of appeals have unanimously held that the Board's decision whether to reopen proceedings *sua sponte* is unreviewable because it is committed to agency discretion by law. See, *e.g.*, Pet. App. 9 (citing *Luis* v.

INS, 196 F.3d 36, 40 (1st Cir. 1999)); *Ali* v. *Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006) (per curiam); *Calle-Vujiles* v. *Ashcroft*, 320 F.3d 472, 474-475 (3d Cir. 2003); *Mosere* v. *Mukasey*, 552 F.3d 397, 401 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009); *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 248-250 (5th Cir. 2004); *Barry* v. *Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Pilch* v. *Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut*, 521 F.3d at 1004; *Ekimian* v. *INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru* v. *INS*, 327 F.3d 998, 1000-1001 (10th Cir. 2003); *Lenis*, 525 F.3d at 1294. This Court recognized this unanimity in *Kucana*. See 130 S. Ct. at 839 n.18 (noting that 11 courts of appeals had "held that such decisions are unreviewable because *sua sponte* reopening is committed to agency discretion by law, see 5 U.S.C. § 701(a)(2)").

b. There is no disagreement in the courts of appeals regarding petitioner's first argument, which is that *all* decisions not to reopen a case *sua sponte* are judicially reviewable after *Kucana*. All of the courts of appeals that have addressed the issue post-*Kucana*—like all of the courts of appeals that had addressed the issue prior to *Kucana*—have adhered to the view that denials of *sua sponte* reopening are unreviewable. See Pet. App. 9; *Pllumi* v. *Attorney Gen.*, No. 09-4454, 2011 WL 1278741, at *2 n.6 (3d Cir. Apr. 6, 2011); *Sharma* v. *Holder*, 633 F.3d 865, 874 (9th Cir. 2011); *Mejia-Hernandez* v. *Holder*, 633 F.3d 818, 823-824 (9th Cir. 2011); *Gor*, 607 F.3d at 187-188; *Ochoa* v. *Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010), petition for cert. pending, No. 10-920 (filed Jan. 18, 2011); *Ozeiry* v. *Attorney Gen* , 400 Fed. Appx. 647, 649-650 (3d Cir. 2010) (per curiam) (unpublished); *Gashi* v. *Holder*, 382 Fed. Appx. 21, 22-23 (2d Cir. 2010) (unpublished); *Jaimes-Aguirre* v. *United*

States Att'y Gen., 369 Fed. Appx. 101, 103 (11th Cir. 2010) (per curiam) (unpublished); see also Pet. App. 14. That is not surprising, because the *Kucana* Court "express[ed] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*," 130 S. Ct. at 839 n.18, and because *Kucana* concerned a matter of statutory interpretation, not the question whether an agency action was committed to agency discretion by law. There is, accordingly, no court that agrees with petitioner's primary argument about the effect of *Kucana* on the courts' unanimous view that Board decisions not to reopen a case *sua sponte* are committed to agency discretion by law.

c. Petitioner likewise has not established any disagreement in the circuits on his second argument, which is that the decision not to reopen a case *sua sponte* becomes reviewable under 8 U.S.C. 1252(a)(2)(D) when an alien raises a "constitutional claim[]" or "question[] of law."

i. As an initial matter, this case does not present the question whether Board decisions not to reopen a case *sua sponte* are judicially reviewable when the alien raises a "constitutional claim[]" or "question[] of law," because the court of appeals did not opine on that question. The court of appeals expressly held that petitioner's petition for review did not present any constitutional claim or question of law. Pet. App. 8-9, 20. Indeed, the court determined that petitioner had "waived" his claim of ineffective assistance of counsel by failing to present sufficient argument in support of the claim. *Id.* at 20 n.1.[5] As a result, the court did not address whether

[5] Although petitioner now contends (Pet. 24) that his petition for review raised a question of law regarding whether "the Board's decision

there would be any exception to the general rule that a decision not to reopen a case *sua sponte* is unreviewable when the alien raises a constitutional claim or question of law. Indeed, the court did not mention Section 1252(a)(2)(D) at all. Accordingly, this case does not raise the question whether a Board decision not to reopen a case *sua sponte* is reviewable when the alien raises a constitutional claim or question of law.[6]

ii. In any event, petitioner has not established that there is any disagreement in the courts of appeals regarding whether denials of *sua sponte* reopening are reviewable when the alien raises a constitutional claim or question of law. Several of the cases petitioner cites do not address *sua sponte* reopening at all; they address other contexts. See *Rosario* v. *Holder*, 627 F.3d 58, 61-62 (2d Cir. 2010) (although court lacks jurisdiction to review denial of alien's application for cancellation of

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was arbitrary and capricious in its finding that this case does not warrant exceptional circumstances," petitioner did not argue that jurisdiction was warranted under 8 U.S.C. 1252(a)(2)(D) on that basis below. Instead, he argued that judicial review was permitted under Section 1252(a)(2)(D) because he raised a constitutional claim, namely, that his attorneys' alleged ineffectiveness denied him due process. Pet. Supp. C.A. Br. 13-16. In any event, petitioner's new claim does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D): it involves the application of settled legal principles to the particular facts of his case, not a question of the meaning of a law or regulation.

[6] Petitioner contends (Pet. 18-20) that the court of appeals erred in twice holding he did not raise a colorable constitutional claim or question of law in his petition for review. That fact-specific disagreement with the court of appeals' decision does not independently warrant this Court's review. In any event, even if the court of appeals erred in that regard, this case still would not warrant this Court's review, because the fact that the court believe that petitioner had waived any constitutional claim or question of law meant that it did not consider whether such claims are judicially reviewable.

removal under 8 U.S.C. 1252(a)(2)(B), review of constitutional claims and questions of law is permitted by 8 U.S.C. 1252(a)(2)(D)); *Argueta* v. *Holder*, 617 F.3d 109, 111-112 (2d Cir. 2010) (same); *Cardoso-Tlaseca* v. *Gonzales*, 460 F.3d 1102, 1106-1107 (9th Cir. 2006) (addressing whether the Board has the authority to grant a motion to reopen filed by an alien who has departed the United States in light of the departure bar in 8 C.F.R. 1003.2(d)); *Mendiola* v. *Holder*, 585 F.3d 1303, 1309-1310 (10th Cir. 2009) (same); *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 63-64 (1st Cir. 1999) (in the context of a denial of a request for suspension of deportation, court stated that despite a statutory jurisdictional bar, the alien could obtain review of a constitutional claim, but that the alien did not raise a colorable constitutional claim). That courts may consider constitutional or legal questions raised in other contexts does not bear on whether courts may consider such claims in the unique context of a Board decision not to exercise its *sua sponte* reopening authority.[7]

Of the remaining decisions petitioner cites (Pet. 12-17), none of them directly addressed whether Section 1252(a)(2)(D) permits judicial review of legal or constitutional challenges to the Board's decision not to reopen a case *sua sponte*. For example, in *Mosere* v. *Mukasey*, *supra*, the court of appeals stated that decisions not to reopen *sua sponte* are unreviewable, but like the decision below, the court said nothing about whether there should be an exception for challenges that raise "questions of law," and it did not address 8 U.S.C.

[7] Petitioner also relies on one decision that is unpublished and non-precedential; this decision cannot create the type of disagreement in published decisions that would warrant this Court's review. See *Nunez* v. *Holder*, 314 Fed. Appx. 736, 737 (5th Cir. 2009) (unpublished).

1252(a)(2)(D), the provision upon which petitioner relies. See 552 F.3d at 400-401. The same is true of *Belay-Gebru* v. *INS*, *supra*, where the Tenth Circuit held that it could not "consider [the alien's] claim that the [Board] should have exercised its *sua sponte* power to reopen his case." 327 F.3d at 1000. The court did not state any exception to that rule or discuss Section 1252(a)(2)(D).

Cruz v. *Attorney General of U.S.*, 452 F.3d 240 (3d Cir. 2006), considered unique circumstances in which the court could not determine whether it had jurisdiction to review the Board's decision in light of 8 U.S.C. 1252(a)(2)(C), which precludes review of certain decisions concerning criminal aliens; the court "remand[ed] th[e] case to the [Board] to give it the opportunity to" address a preliminary question about the alien's prior conviction and "to decide, based on the outcome of this analysis, whether it should exercise its *sua sponte* authority to reopen [the alien's] case." 452 F.3d at 242-243, 248-249. Although the court recognized that it generally "lack[s] jurisdiction to review [Board] decisions not to reopen proceedings *sua sponte*" because "there is no standard governing the agency's exercise of discretion," it did not rule on whether the particular claim at issue was reviewable because it remanded the case to the Board for clarification. *Id.* at 249-250.[8] In *Cevilla* v.

[8] A case petitioner does not cite, *Pllumi* v. *Attorney General of United States*, *supra*, is similar: the Third Circuit remanded to the Board because it could not tell whether the Board had denied *sua sponte* reopening based on an "incorrect legal premise." 2011 WL 1278741, at *3. The court stated that although decisions whether to reopen a case *sua sponte* are "are committed to the unfettered discretion of the [Board]," the court may "recognize when the [Board] has relied on an incorrect legal premise" and "remand to the [Board] so it may exercise its authority against the correct legal background." *Id.* at *2-*3

Gonzales, 446 F.3d 658, 662-663 (2006), the Seventh Circuit held that the Board's determination that an alien was ineligible for cancellation of removal did not violate due process. The court's discussion of jurisdiction in that case was premised upon a reading of 8 U.S.C. 1252(a)(2)(B) that this Court rejected in *Kucana*, and the court did not decide the question presented here. 446 F.3d at 660-661.

In *Tamenut* v. *Mukasey*, *supra*, the court held that "the [Board's] decision whether to reopen proceedings on its own motion is committed to agency discretion by law." 521 F.3d at 1004. The court suggested in passing that it "generally do[es] have jurisdiction over any colorable constitutional claim," but the court did not explain the legal basis for that suggestion or discuss Section 1252(a)(2)(D), and the suggestion was *dicta* because the court concluded that the alien did not raise any colorable constitutional claim. *Id.* at 1004-1005. *Lenis* v. *United States Attorney General*, *supra*, is similar: after the court of appeals held that the Board's decision not to reopen a case *sua sponte* is unreviewable, 525 F.3d at 1292-1294, it noted that "an appellate court may have jurisdiction over constitutional claims related to the [Board's] decision not to exercise its *sua sponte* power," but then decided that it had "no occasion to examine that question" because "no constitutional claim [wa]s raised," *id.* at 1294 n.7.

Finally, in *Luis* v. *INS*, *supra*, the court of appeals held (in the context of a motion to reconsider) that "the decision of the [Board] whether to invoke its *sua sponte* authority is committed to its unfettered discretion"; "the

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(internal quotation marks omitted). The court did not discuss Section 1252(a)(2)(D).

very nature of the claim renders it not subject to judicial review" and it "is not subject to review by this court." 196 F.3d at 40-41. The court then addressed the alien's contention that the Board's refusal to grant her motion to reconsider her case violated her due process rights and found it "frivolous." *Id.* at 41. Although the court stated that it "ha[d] jurisdiction" to consider that claim, *ibid.*, it did not qualify its holding that denials of *sua sponte* reopening are unreviewable, and (as particularly relevant here) it did not rely upon, or even mention, 8 U.S.C. 1252(a)(2)(D).[8] In this case, the court of appeals relied the rule in *Luis* to hold that a Board decision not to reopen a case *sua sponte* is unreviewable. Pet. App. 8-9.

Because none of the decisions petitioner cites either expressly adopted or expressly rejected his argument that Section 1252(a)(2)(D) allows judicial review of legal or constitutional challenges to a decision not to reopen a case *sua sponte*, there is no disagreement in the circuits warranting this Court's review.

3. This case would present a particularly poor vehicle to consider the reviewability of Board decisions not to reopen a case *sua sponte*, because even if such decisions were reviewable, the Board acted well within its broad discretion here. The Board reserves its *sua sponte* reopening authority for "exceptional situations," explaining that the "power to reopen on [the Board's] own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations,

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[8] The only authority the court cited for the proposition that the alien's due process claim was reviewable was *Bernal Vallejo* v. *INS*, *supra*, a case addressing denial of a request for suspension of deportation, not a decision of the Board not to reopen a case *sua sponte*. See p. 25, *supra*.

where enforcing them might result in hardship." *In re J.J.-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997); see Pet. 6 (accepting this standard). The request at issue is petitioner's second attempt to reopen his case, made five years after his removal order became final. In the request, petitioner sought a new form of discretionary relief—adjustment of status—but he did not demonstrate that he satisfies the prerequisities for that relief.[10]

To qualify for adjustment of status, an applicant is required to show that he "is eligible to receive an immigrant visa and is admissible to the United States for permanent residence * * * and * * * an immigrant visa is immediately available to the alien at the time the application is filed." 8 U.S.C. 1255(i)(2). Generally, two governmental approvals are required to make such a showing for an employment-based immigration preference: (1) approval by the Department of Labor of an application for alien labor certification, and (2) approval by the Department of Homeland Security of a visa petition for the benefit of the adjustment applicant who is to fill the position. The issuance of the labor certification establishes that the alien is not inadmissible under 8 U.S.C. 1182(a)(5)(A)(i), which requires an employer of an alien seeking admission to the United States to perform skilled labor to first obtain certification from the Secretary of Labor that there are not sufficient workers to perform the particular labor in the relevant area. The approval of the visa petition with a current priority date,

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[10] Petitioner's ineffective assistance of counsel claim is ancillary to his claim for adjustment of status: petitioner contended that his prior attorneys' ineffectiveness meant that the Board should either treat his request as a timely motion to reopen under 8 U.S.C. 1229a(c)(7), or should reopen his case *sua sponte* so he could pursue adjustment of status. A.R. 14-17.

on the other hand, establishes that an immigrant visa is immediately available to the alien. See *United States* v. *Ryan-Webster*, 353 F.3d 353, 355-356 (4th Cir. 2003) (describing process and the significance of each step). Petitioner argued in his second request for reopening that he was the beneficiary of a labor certification, but he did not argue or include evidence showing that he had ever received an approved visa petition. Petitioner's failure to demonstrate eligibility for the relief he requested thus also would have warranted the denial of his request for reopening. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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